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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is fundamentally unfair and contrary to petitioner's Fifth Amendment rights to uphold his conviction for the first time on appeal upon charges not made by indictment?

2. Whether it is fundamentally unfair for an appellate court to refuse to appraise petitioner's case as it was charged, tried, and as the trial issues were determined?

If such appellate procedure may be countenanced:

3. Whether coconspirator's statements may be introduced under Rule 801(d)(2)(E), Federal Rules of Evidence, without first determining that a conspiracy exists by independent evidence?

4. Whether the "untainted" evidence is sufficient to sustain petitioner's conviction?

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

*Jack Difilippi was also an appellant in the case below from which this petition has been taken.

Your Petitioner, JOSEPH C. BONANNO, SR., prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its decision entered on the 30th day of July, 1982, affirming his conviction under 18 U.S.C. Section 371.

OPINIONS BELOW

The Memorandum of Decision dated August 12, 1980, finding Mr. Bonanno guilty of Count One, Conspiracy to Obstruct Justice, is attached hereto as Appendix A. The Order of the United States Court of Appeals for the Ninth Circuit, remanding this cause to the United States District Court for the Northern District of California dated December 9, 1981, is attached hereto as Appendix B. The Decision of the United States District Court for the Northern District of California upon remand, dated January 11, 1982, is attached hereto as Appendix C. The Memorandum of the United States Court of Appeals for the Ninth Circuit, affirming Mr. Bonanno's conviction after limited remand, dated July 30, 1982, is attached hereto as Appendix D. All of these opinions are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, affirming Mr. Bonanno's conviction, was entered on July 30, 1982. A timely petition for rehearing was denied on October 15, 1982, (Appendix E), and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth and Sixth Amendments to the United States Constitution, Title 18, U.S.C., Sections 371 and 1503 and Rule 801(d)(2)(E), Federal Rules of Evidence. *See* Appendix F, for text of provisions.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

This case began its formal existence on April 26, 1979, when a grand jury sitting in San Francisco, California, returned an indictment charging Joseph C. Bonanno, Sr. and Jack Difilippi in Count One with conspiracy to obstruct justice in violation of Title 18 of the United States Code, Section 371. The indictment contained six additional counts against Mr. Difilippi alone. This indictment appears as Appendix G, attached hereto.

Mr. Bonanno was charged with entering into an agreement to influence, intimidate or impede a witness before the grand jury (investigating certain businesses in the Northern California area—businesses to which Mr. Bonanno's sons were allegedly connected) or an agreement to obstruct, influence or impede the due administration of justice.

Prior to trial, numerous motions on behalf of Mr. Bonanno were filed, the most significant of which was the Motion to Suppress and Memorandum in Support of Motion to Suppress. For approximately four years, the government had reconstituted Mr. Bonanno's personal thoughts as expressed in his most private writings. These writings had been torn into pieces and placed in the trash for ultimate destruction. Mr. Bonanno sought to suppress the use of these notes as evidence at trial and their prior use in furnishing probable cause for a search warrant and a Title III wiretap.

Hearings on the motion began on July 13, 1979, and continued for nine days thereafter. During the course of these hearings, supplemental memoranda were filed on behalf of Mr. Bonanno and on behalf of the government.

Following these hearings, Judge Ingram granted in part and denied in part the motion to suppress by Memorandum of Decision, filed November 14, 1979.[1]

The non-jury trial before Judge Ingram commenced on April 11, 1980, and concluded on July 24, 1980. On August 12, 1980, the district court entered its Memorandum of Decision (Appendix A) finding, *inter alia*, Mr. Bonanno guilty of the offense charged in Count One of the indictment. Specifically, the district court found Mr. Bonanno guilty of conspiracy to obstruct justice and further found that "[i]n furtherance of the purposes and objectives of said conspiracy, beyond a reasonable doubt each of the following overt acts [in the Indictment] were committed by one or more of said defendants: A-E, F, M, N (in respect to Count 2 only), Q, R, T, U, V, W (as to Counts 4 and 5 only)."

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[1]By this order, the following specific items were suppressed: "Any conversations . . . had between defendant and any attorney with whom he had an attorney-client relationship . . . the document denominated 'memoirs,' and all copies or translations thereof, together with any other items [not] relating to the allegations to the indictment on file in this action, and not on their face relevant to the alleged commission of some other crime. All attorney-client communications, particularly those between Albert J. Krieger, Esq. and Mr. Bonanno, together with all attachments and supplements thereto . . ."

Mr. Bonanno was sentenced on January 12, 1981, and a timely appeal to the United States Court of Appeals for the Ninth Circuit was taken.

On appeal, Mr. Bonanno raised only one issue, dispositive in nature. That issue related to the evidence introduced to prove the overt acts alleged in Count One of the Indictment. The verdict, if it is to stand, must rely upon one of those overt acts. That issue was stated as:

> Whether the government violated Joseph C. Bonanno, Sr.'s constitutional guarantees of freedom of thought and right of privacy by both taking and reconstructing his private written thoughts?

On December 9, 1982, the United States Court of Appeals for the Ninth Circuit ordered this case remanded (Appendix B, App. B 1-2), for the limited purpose of determining "the basis for the court's judgment that defendants were guilty of conspiracy to obstruct justice . . . . [and] whether there was sufficient evidence of defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash."

On December 23, 1981, a hearing was conducted before the Honorable William A. Ingram, United States District Judge for the Northern District of California, pursuant to the Ninth Circuit's direction. On January 11, 1982, Judge Ingram issued his Decision (Appendix C). Without discussion of the basis for his initial finding that Mr. Bonanno was guilty of conspiracy to obstruct

justice,[2] the trial court reviewed the only evidence, which it believed to be untainted by the reconstructing of Mr. Bonanno's private notes and thoughts. The evidence which Judge Ingram considered on remand is set forth and summarized in pages 2-12 of his Decision (App. C-2-C-20). This evidence consisted of certain conversations between Louis Peters and Mr. Bonanno and Louis Peters and Mr. Difilippi, and inferences drawn therefrom. These conversations and their subject matter were not referenced in the indictment (Appendix G),[3] and were solely relevant to the element of intent.[4] The trial court on remand found no fatal variance by its reconstruction of the evidence. Defense counsel vigorously argued that such a finding was tantamount to a second trial and an amendment to the indictment thus violating Mr. Bonanno's Fifth Amendment guarantees. While Judge Ingram expressed his opinion that "this aspect of this case is troubling," (Appendix C, App. C-24), he found that there was no "claim of surprise" nor "lack of knowledge on the part of defendant and his counsel of the evidence supporting the unalleged overt act," *Id.*, and thus concluded that Mr. Bonanno's substantial rights had not been affected. Unaddressed in their entirety

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[2]Judge Ingram's Memorandum of Decision adjudging Petitioner guilty, dated August 12, 1980, appears as Appendix A hereto, and contains explicit findings of fact for the basis of his initial verdict.

[3]*See* Judge Ingram's Decision of January 11, 1982, p. 15 (Appendix C, App. C-24): "11. None of the overt acts so proven [by the Peter's incident] are alleged in the Indictment, and none of the overt acts which are alleged in the Indictment were proven by the evidence herein discussed."

[4]For this reason, petitioner did not object to its introduction into evidence at trial.

were Mr. Bonanno's arguments that this fact-finding procedure was a trial of an uncharged crime, a judicially-constructed amendment to the indictment, and a violation of Mr. Bonanno's Fifth Amendment rights.

Thereafter, the parties, pursuant to the Ninth Circuit's order (Appendix B), filed supplemental briefs regarding the district court's findings on remand. Again, Mr. Bonanno urged that the trial court's decision upon the limited remand unconstitutionally found Mr. Bonanno guilty of a crime not charged in the indictment returned by the grand jury. Further, Mr. Bonanno claimed that, even if such procedure could be constitutionally countenanced, the trial court's finding of guilt was in contravention of the requirements of Rule 801(d)(2)(E), Federal Rules of Evidence, and the decisions of the Ninth Circuit that independent proof of the existence of a conspiracy and the defendant's connection therewith be found before alleged statements of coconspirators would be admitted against said defendant. Mr. Bonanno also argued that, given the inadmissibility of these statements under Rule 801(d)(2)(E), there was insufficient evidence to support the conspiracy conviction.

On July 30, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the trial court's finding of guilt upon the "untainted" evidence. (Appendix D). The Ninth Circuit's Memorandum Opinion (omitting any mention of the fact that the trial court's finding upon remand of sufficient untainted evidence was unrelated to its initial determination of guilt), affirmed the lower court's legal conclusion that no fatal variance occurred in predicating Mr. Bonanno's conviction upon

a single overt act uncharged in the indictment,[5] and that the district court did not err in its finding under Rule 801(d)(2)(E), Federal Rules of Evidence. As a result, the Ninth Circuit held (Appendix D, App. D-10):

> We are now convinced that the district court concluded that the defendants were beyond a reasonable doubt guilty of conspiracy to obstruct justice based on the evidence concerning the defendant's activities with Peters. Accordingly, we need not consider any issue concerning the admissibility of evidence seized from Mr. Bonanno's trash can unless there is proof that the Peters transaction was a fruit of that search. . . .[6]

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[5]The Ninth Circuit also failed to address the question of amendment and a violation of Mr. Bonanno's Fifth Amendment rights, and instead framed the issue as a variance between proof and indictment, thus generating inquiry into whether it was harmless error. Mr. Bonanno has always maintained and maintains now, that the harmless error analysis should be inapplicable to the resolution of the issues arising from the appellate and remand procedures in this case.

[6]Ancillary to the court's holding was a finding that the Peters incident was not a fruit of the unconstitutional reconstructing of Mr. Bonanno's personal notes and thoughts.

Statement of the Facts

The indictment under which Joseph C. Bonanno, Sr. was convicted, was filed on April 26, 1979, and charged events occurring in the fall and winter of 1978-1979. To understand the genesis of this indictment requires a backward look to December, 1975.

At that time, the Arizona Drug Control District (also known as the Arizona Strike Force), decided to investigate Mr. Bonanno, a long term resident of the City of Tucson. They had no probable cause to believe that he had committed any crime nor did they have probable cause to link him with any crime of which they were aware. RT 270(3), 370(7).[7] The linchpin of this investigation was a covert taking of Mr. Bonanno's private notes and personal memoranda. These writings, and the fruits thereof, created the basis for the grand jury investigation and constitute the allegations recited as overt acts in the ensuing indictment. By taking these writings, both freedom of thought and rights of privacy were effectively denied to him. We illustrate.

Then in the waning years of his life, Mr. Bonanno lived in a small single family house, similar to others in the neighborhood. He had lived there, or a few blocks away, for over thirty years. During this period, he had been the unwilling and unfortunate subject of intensive Federal Bureau of Investigation (hereinafter FBI) attention. Illegal eavesdropping was routine. In the preceding fifteen years alone, Mr. Bonanno had been

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[7]Reporters' Transcript references are indicated herein as RT Page (Volume) of the district court pre-trial and trial proceedings.

prosecuted for conspiracy to obstruct justice and acquitted; an indictment for a like alleged offense had been dismissed; he was subpoenaed for grand jury appearances; and he had been the intended victim of a vicious death plot orchestrated by FBI Agent David Hale.[8]

Against this backdrop, Eugene Ehmann, after seven years with the FBI, some of which had been spent in Tucson investigating Mr. Bonanno, joined the Arizona Strike Force. RT 30-31(2). The only articulable activity (if such be the word) of Mr. Bonanno that fostered their efforts was his reputation, which so far as we are aware, is not a violation of any federal statute. (*See* Memorandum of Decision, November 14, 1979, p. 1; testimony of Eugene R. Ehmann, Pretrial Hearings, RT 33(2)).

Ehmann, aided, assisted, and abetted by his former FBI associates, commenced, on December 8, 1975, a surreptitious taking of the contents of Mr. Bonanno's trash can in a novel and bizarre fashion. Early in the morning of the day of the garbage pickup (Mr. Bonanno having placed his garbage cans out for collection the night before), the agents would furtively arrive in a van. The side door would open, the can would be taken into the body of the van, emptied, fake garbage substituted, and the can replaced. RT 39-40(2). The purpose of the substitution was to prevent the discovery

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[8]*Parade Magazine*, February 12, 1978, Defendant's Exhibit B, RT 1497(31) and 1501(31). Reporters' Transcript references to exhibits are indicated herein at RT Ident (Volume) and Evid (Volume).

of their activities by a chance circumstance. This way, to the unsuspecting observer, the cans would still appear to be full. RT 61(1). This activity continued until on or about April 13, 1979.

The contents of the cans would be taken to a location where they would be sifted for anything of interest. From the beginning, the agents focused upon torn up pieces of paper—usually, the remnants of five by eight inch miniature legal pads which, before being placed in the trash for ultimate destruction, had been torn into scraps approximately one inch square.[9] RT 60(1), 22(2). As if a jigsaw puzzle, these scraps were reconstructed, read, and analyzed by both state and federal authorities. Whatever was gleaned from these papers was interchanged between those two authorities, and sometimes others. RT 35(2).

Typically, when assembled, the memorandum or note, having been written by Mr. Bonanno, were notations to self; calendarings of daily activities; and, meditations, musings, and reflections on past, present, and future events, both real and imagined. These notes, up to and including the month of August of 1978, did not in total, or together with the fruits of investigations therefrom, lead to a finding of probable cause that a crime was being committed, had been committed, or that Mr. Bonanno had participated in any criminal activity. RT 270(3).

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[9]Over 1500 reconstructed notes alone were provided to Mr. Bonanno in pre-trial discovery. RT 11(1).

In September of 1978, after just short of three years of this gross rummaging through the thoughts of Mr. Bonanno, certain notes were recovered that excited the agents' suspicions. Contemporaneously, the government had mounted a sweeping investigation, general and pervasive in nature, into the activities of Salvatore Bonanno and Joseph Bonanno, Jr., the two sons of Mr. Bonanno. A grand jury, impaneled in the Northern District of California, sat in San Francisco examining the relationship of the two sons with the struggling business entities to which they were arguably connected. Mr. Bonanno was suspected of, in some way, influencing the testimony of witnesses who had been subpoenaed to testify before that grand jury, and interfering with the production of certain records demanded by virtue of subpoenas duces tecum served upon various alleged custodians. RT 2554-55 (39).

By interweaving its interpretations of the notes recovered during September of 1978 with pre-existing suspicion and surveillance, the government sought a Title III eavesdropping order, dated October 6, 1978, providing for interception of the home telephone of Mr. Bonanno. Incoming and outgoing conversations were intercepted, recorded, and monitored.

The application for the Title III order set forth, in detail, the desire of the grand jury for the business records of two of the entities, U.S. Mattress Co. and Kachina Enterprises, Inc., whose relationship and activities with the Bonannos were being investigated. The frustration of the prosecutor and grand jury in their efforts to obtain these records was the thrust of the prayer for the eavesdropping relief. Nevertheless, at the time of the drafting and submission of the Title

III application, these records were already in the possession of a journalist, Marilyn Baker, who enjoyed a symbiotic relationship with the FBI.[10]

In or about November, 1978, Baker told the FBI in San Francisco that she had copies of the Bonanno business records. RT 2497(38), 2538(39). Baker refused to turn over the books and records without guaranteed anonymity. RT 2513-14(38). The FBI would not make such a promise, and the books and records were never sought by subpoena from Baker in spite of the grand jury's stated desire for them. RT 2429-31(38).

Five months later, during the month of March of 1979, Mr. Bonanno, despite unequivocal illness, was ordered to appear before a grand jury and produce those self-same books and records. As anticipated, and as the government had been informed, he did not and could not produce books and records which he did not have. RT 43(3). The government knew very well, or should have known very well, that those books and records were available from Baker.

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[10]Baker and other media people, as a matter of routine, would regularly meet with members of the FBI. In exchange for leads supplied by the press, the FBI would leak matters which they considered newsworthy to these chosen few of the media. RT 2534-35(39). Through a relationship Baker had cultivated with Salvatore Bonanno's secretary, Baker was able to obtain possession of the books and records for U.S. Mattress Co. and Kachina Enterprises, Inc., RT 2464(38); 2258-59(37). When the secretary was subpoenaed before the grand jury and requested to produce these records, she invoked her privilege against self incrimination. RT 2276-77(37). The books and records were also the subject of a subpoena served upon Mr. Bonanno in Tucson. Although Baker finally returned the records to Salvatore's secretary, in the interim, Baker had photocopied them in their entirety. RT 2493(38).

It was only in July of 1979, after the indictment had been returned, that Baker made arrangements to turn over her photocopies of the books and records to the government. RT 2424(38). An arrangement was made for anonymity, RT 2523(38), which remained secret until exposed by defense counsel some three months later. RT 2310-15(38).

On February 15, 1979, after Baker had returned the books and records, Lou Peters, an FBI informant, telephoned Mr. Bonanno at his home in Tucson.[11] Peters, a car dealer from Stockton, California, had volunteered some two years earlier to become an FBI informant as to the Bonannos after being approached by a prospective purchaser of his dealership. RT 1324-29(29). The prospective purchaser touted himself to be an intimate of the Bonanno sons. Peters recorded many of his numerous meetings and conversations. RT 1345-47(29). He developed a relationship with Salvatore Bonanno and Jack Difilippi, Mr. Bonanno's co-defendant, and was at one time a guest in Mr. Bonanno's home. Regardless of the closeness, he discovered no criminal activity, and, after over two years of meetings, conversations, and observations, the FBI chose to terminate his service. RT 1549(31).[12]

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[11]It is the evidence recited in this and the following paragraph, to which we refer as the "Peters incident," and upon which the district court seized on remand to find untainted evidence of guilt. This evidence, however, is not the basis for the underlying indictment (Appendix G) nor for the district court's finding of guilt after the bench trial (Appendix A, App. A-11).

[12]In order to do this, the "FBI agents arranged for Peters to be subpoenaed . . . [and] was instructed by the FBI to call Bonanno to tell him of the subpoena." (Appendix D, App. D-4).

In the February 15, 1979, telephone call (a monitored conversation which is not a part of the Title III intercepts), Peters told Mr. Bonanno that he, Peters, had been subpoenaed to appear before the grand jury. He indicated that their interest probably concerned the sale for cash of a car that Salvatore Bonanno had "owned." The mention of cash and his son triggered a panicked reaction in Mr. Bonanno. He eventually suggested to Peters, who manipulated him deftly, that the records of this transaction, of which he was then hearing for the first time, be set aside for further discussion. RT 1690(32).

On March 17, 1979, an extensive search, pursuant to warrant, was conducted in Mr. Bonanno's home. The affidavit in support of the application for the search warrant in major detail tracked the affidavit in support of the application for the Title III eavesdropping warrant of October, 1978.[13] There where, in addition, some facts which had developed subsequent to the eavesdropping.[14]

The intrusion into the reminiscenses and reflections of Mr. Bonanno by reconstituting notes from the trash was not the only indignity which he was compelled to suffer during those years of pervasive surveillance. In early winter of 1977, the FBI, together with the Arizona Strike Force, also obtained authority to install pen registers, with eavesdropping capability, on five separate phones, and a beeper device on Mr. Bonanno's car,

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[13]Affidavit for Search Warrant, Plaintiff's Exhibit 12, RT 232(2), 232(2).

[14]Whatever facts were developed did not disclose any criminal activity of Mr. Bonanno with respect to the businesses being investigated. RT 209(6).

based upon a perjurious affidavit and false testimony.[15] These illegal acts are detailed officially in the *Hyder Report*, ("A Report, Charles F. Hyder, Maricopa County Attorney, On the Investigation Into Illegal Wiretapping By Members of the Four County Strike Force; Scope, Motivation, and Ramifications of the Crime," October 4, 1977).

As a result of a combination of the notes recovered from the trash, the telephone conversations, the evidence obtained by the execution of the search warrant, and some supplementation by conventional evidence,[16] the government was found to have sustained its burden of proof in a non-jury trial before the Honorable William C. Ingram, United States District Court Judge, Northern District of California. (Appendix A). From that conviction, the appeal to the Ninth Circuit was taken.

The Peters incident (see pp. 15-16, *supra*), although not relating to any overt act recited in the indictment, was relevant to the issue of intent.[17] Indeed, it was

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[15]"The evidence adduced before this Court, in a hearing which consumed several days, revealed a course of conduct on the part of Arizona State agents, which was both unlawful and reprehensible. This included unlawfully tapping telephone conversations, falsely swearing before state court judges in order to obtain permission to install a beeper device on the defendant's automobile, and execution of false and misleading affidavits." *Memorandum of Decision*, November 14, 1979, p. 2.

[16]This conventional evidence, of course, was the Peters incident.

[17]The record of the trial below contains over 3,000 pages of transcript and 286 government exhibits. The Peters incident, upon which the trial court relied in reaching its conclusion under the limited remand, consisted of five exhibits and a few pages of testimony.

upon this basis that the district court considered it in returning its verdict of guilty on Count One. (Appendix A, App. A-10)

REASONS FOR GRANTING THE WRIT

THIS COURT OUGHT TO GRANT CERTIORARI IN ORDER TO RECTIFY THE CONSTITUTIONAL ERROR OF THE NINTH CIRCUIT IN ORDERING AND SANCTIONING A FINDING OF GUILT ON REMAND UPON CHARGES NOT MADE BY INDICTMENT AS THIS PROCEDURE DIRECTLY CONFLICTS WITH THE CONSTITUTION, THIS COURT'S OPINIONS, AND DEPARTS FROM THE ACCEPTED COURSE OF PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It has been long understood that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937); *accord, Thornhill v. Alabama*, 310 U.S. 85, 96 (1940); *Cole v. Arkansas*, 333 U.S. 197, 200-202 (1948); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969); *Dunn v. United States*, 442 U.S. 100, 106-107 (1979); *cf., Presnell v. Georgia*, 439 U.S. 14, 16 (1978). The appellate procedure employed by the Ninth Circuit in this case sanctioned—indeed invited—the district court to find Mr. Bonanno's guilt for the first time on remand upon an offense uncharged in the indictment; and compounded this error by refusing to review the validity of his initial conviction by consideration of the issues upon which he was tried. *Cole v. Arkansas, supra*, 333 U.S. at 202. Such appellate

procedure so violates the basic principles of due process and so nullifies Mr. Bonanno's Fifth Amendment right not to be held "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," that it demands a remedy that only this Court, in its supervisory capacity, can now provide.

Initially, this Court confronted the appellate error about which we complain in this case, in cases involving review of State court affirmances. Thus, based upon Fourteenth Amendment notions of due process solely,[18] this Court recognized the constitutional infirmity of appellate affirmances upon grounds not spawned from the charging document itself.

Cole v. Arkansas, 333 U.S. 197 (1947), illustrates the requirements of due process which should have guided the Ninth Circuit in this case. In reversing, this Court recognized that two basic concepts of due process were violated by such an appellate ruling. First was the notion of fair notice and the right to defend, *id.*, 333 U.S. at 201:

> No principle of procedural due process is more clearly established than that notice of a specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * * It is as much

[18]In State courts the Fifth Amendment requirement of convictions based solely upon indictment does not apply. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

> a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. [omitting citations]

Second, this Court recognized that due process also required appellate review consistent with the trial held below, *id.*, 333 U.S. at 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Both due process concerns have been equally violated by the Ninth Circuit's creative restructuring of Mr. Bonanno's trial in this case. Unwilling to address the First Amendment issue,[19] the Ninth Circuit remanded the case for what amounted to a new, summary trial upon an old record, for a determination whether conviction could be upheld upon evidence unaffected by constitutional infirmity, and an overt act uncharged by the indictment. After the district court announced its second verdict of guilt upon this theoretically disinfected record, the Ninth Circuit affirmed, without reaching the constitutional issue which was not only raised throughout the trial proceedings, but also which directly affected each and every overt act contained in the indictment. In like

[19]This constitutional issue, we acknowledge, is one of first impression in American jurisprudence. Howsoever difficult this issue may be to resolve, we submit that petitioner had a right to a response on its merits.

fashion to the appellate procedure addressed in *Cole*, this circuitous ruling denied Mr. Bonanno his due process rights. *See also, Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (a conviction for disorderly conduct based upon the manner in which a demonstration was conducted upheld by the Illinois Supreme Court upon the grounds that petitioners had refused to obey a lawful order to disperse violates due process); *Garner v. Louisiana*, 368 U.S. 157, 164 (1961) ("[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."); *In Re Oliver*, 333 U.S. 257, 273 (1948).

Related cases of this Court have acknowledged that this principle obtains whether the case is tried before a judge or a jury, *Thornhill v. Alabama*, 310 U.S. 91 (1940) (conviction after bench trial based upon complaint broadly charging loitering and picketing cannot be saved by restrictive view of evidence on appeal to meet constitutional reach of statute); or whether the Fifth Amendment right to be tried solely upon indictment provides an alternative ground for relief, *Dunn v. United States*, 442 U.S. 100, 105-106 (1979).[20]

This Court's holding in *Dunn*, *supra*, should have dispelled any notion that the Ninth Circuit might have had that their approach to the appellate issues and novel remand could pass constitutional muster. In *Dunn*, the petitioner was charged by indictment with perjury, specifically based upon irreconcilable contradictory

[20]In the earlier cases, involving State court convictions, the Fifth Amendment right to trial upon indictment is inapplicable; *see e.g., Gerstein v. Pugh*, 420 U.S. 103 (1975).

declarations (18 U.S.C. Section 1623(c)), between the petitioner's grand jury testimony and statements made on September 30 in an attorney's office. Also introduced at trial was the petitioner's testimony at an October evidentiary hearing, which reaffirmed his September 30 declarations and thus also contradicted the previous grand jury testimony. On appeal to the Tenth Circuit, the petitioner raised the same contention he had raised throughout trial; viz, that the September 30th interview did not constitute an "ancillary proceeding" as required by the statute. In strikingly similar manner to the instant case, the Tenth Circuit upheld the conviction by finding that the material inconsistency of the charges could easily rest upon the October evidentiary hearing rather than the infirm September 30th interview, thus dispelling the need to address the defendant's contention that it was not an "ancillary proceeding" and therefore outside the reach of the statute. Upon this reasoning, the Tenth Circuit identified the sole issue remaining in the case as one of variance between pleading and proof,[21] promptly found that the petitioner had to have anticipated

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[21]Specifically, this Court held in *Dunn*, that the due process issue preempted the need to discuss whether this creative appellate affirmance constituted an amendment to the indictment or a variance between pleading and proof, *id.*, 442 U.S. at 105-106: "In our view, it is unnecessary to inquire, as did the Court of Appeals, whether petitioner was prejudiced by a variance between what was alleged in the indictment and what was proved at trial. For we discern no such variance. The indictment charged inconsistency between petitioner's statements in the September 30 interview and his grand jury testimony. That was also the theory on which the case was tried and submitted to the jury." We rest upon this artful distinction in urging the appellate error in this case as one of fundamental due process. Nevertheless, if this Court grants certiorari, as an alternative ground, we will also urge that such procedure

the introduction of the October testimony as it was "inextricably related" to his September 30th declaration, and thus ruled that the variance was not fatal.

In reversing the judgment of the Tenth Circuit, this Court again reaffirmed the cited and recited due process principle upon which our petition rests, *Dunn v. United States*, 442 U.S. at 106-07:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 157, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); DeJonge v. Oregon, 299 U.S. 353, 362 (1937). There is, to be sure, no glaring distinction between the government's theory at trial and the Tenth Circuit's analysis on appeal. The

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(Footnote 21 Continued)

constitutes a latter-day appellate amendment to the indictment, *Stirone v. United States*, 361 U.S. 212 (1960); and a fatal variance between pleading and proof, *Berger v. United States*, 295 U.S. 78 (1935). *See also Jeffers v. United States*, 392 F.2d 740, 753 (9th Cir. 1968) (where mail fraud count was predicated upon a specific theory by indictment, but the government sought to uphold on another theory on appeal, case must be reversed as "[e]ven if the latter was *proved* at trial, we cannot say that such was intended to be *charged* by the grand jury, for the indictment is susceptible of being construed to charge the former by its very wording. . . ." (emphasis in original).

> jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. *But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same results would likely obtain on retrial.* (Emphasis added).

Here, the remand to the district court and the retrial of the petitioner, requires the same result. We request that a writ of certiorari issue in order to rectify the unconstitutional result suffered by petitioner here, and to prevent its repetition in future cases.

Further, petitioner's conviction rests upon a conspiracy under 18 U.S.C. Section 371, which requires that *both* an illegal agreement *and* an overt act in furtherance of the conspiracy be pleaded and proved; *Grunewald v. United States*, 353 U.S. 391, 397 (1957); *Fiswick v. United States*, 329 U.S. 211, 216 (1946). This mandate adds but one more basis why petitioner's conviction cannot stand solely upon evidence not contained in overt acts of the indictment.

Finally, were the oft-repeated due process principles contained in the above recited cases as yet unwritten, we would still urge fundamental procedural due process and Sixth Amendment errors in the appellate review of Mr. Bonanno's conviction. Here, the Ninth Circuit directed what it termed a "limited remand" (Appendix

C, App. C-1), to the district court[22] upon the ultimate issue in all criminal cases: the question of whether the evidence sustained guilt beyond a reasonable doubt. Under the superficial gloss of a quest to determine harmless error, the Ninth Circuit sanctioned by this procedure, in this circumstance and under these facts, a retrial stripped of all the due process rights which normally attach to criminal trials. Accordingly, Mr. Bonanno was retried upon remand without the right to prepare his defense, confront the witnesses against him, and have his case tried before an impartial trier of facts. We submit, and will argue if certiorari is granted, that such procedure steps wide of the restrictive reach of the determination of harmless error permitted by *Chapman v. California*, 386 U.S. 18 (1967), and effectively denies Mr. Bonanno his day in court.

THIS COURT OUGHT TO GRANT CERTIORARI, EVEN IF IT DETERMINES THAT THE APPELLATE PROCEDURES WERE NOT INFIRM, IN ORDER TO ANNOUNCE THAT *GLASSER v. UNITED STATES*, 315 U.S. 60 (1942), STILL REQUIRES THAT "PROOF ALIUNDE" OF THE EXISTENCE OF CONSPIRACY BE FOUND BEFORE COCONSPIRATORS STATEMENTS ARE ADMISSIBLE UNDER RULE 801(d)(2)(E), *FEDERAL RULES OF EVIDENCE*.

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[22] If certiorari were granted, we would also urge that appellate remand to the district court after a bench trial in a criminal case is inherently improper, *cf., Mesarosh v. United States*, 352 U.S. 1, 11-12 (1956) (refusing to remand to trial court for determination of whether sufficient evidence remains in record to sustain guilt

In *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), this Court announced, that the statements of co-conspirators are admissible "only if there is proof aliunde that [the person against whom the declarations are offered] is connected with the conspiracy." Subsequent to this statement, in 1975, Rule 801(d)(2)(E), Federal Rules of Evidence, was promulgated in its present form.

Although this requirement was reaffirmed in 1974, *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974), this Court has not reviewed any case raising this issue, since the passage of the rule in 1975. At least one Circuit has expressly found during this Court's silence, that the requirement of proof by independent evidence in *Glasser* was legislatively overruled. *United States v. Martorano*, 557 F.2d 1, 11 (1st Cir. 1977); *United States v. Petrozziello*, 548 F.2d 20, 23 n.2 (1st Cir. 1977). Although the Ninth Circuit, in this case and by previous precedent, requires that the preliminary findings required under the rule be found "through the introduction of substantial independent evidence other than the contested hearsay," *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981),

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(Footnote 22 Continued)

once evidence tainted by perjury removed from consideration); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (in refusing to uphold defective warrant on new theory not presented at suppression hearing prior to trial, this Court stated: "To permit the government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence to rebut the contentions that the government makes here for the first time.")

see Appendix D, App. D-14, D-15, it has ignored this aspect in its affirmance of the district court's determination upon remand. We illustrate.

Upon remand, the district court reviewed all of the evidence adduced at trial which it determined was untainted by the unconstitutional obtaining and reconstructing of Mr. Bonanno's notes and thoughts. Thus, omitted from its consideration were the results of the government's extensive trash search and the Title III interceptions, which were fruits thereof. The only remaining items of evidence concerned the Louis Peters incident, which evidence consisted of 1) a conversation between Peters and Mr. Bonanno on February 15, 1979, 2) a meeting between Peters and Mr. Difilippi on February 22, 1979, 3) a meeting and conversation between Peters and Mr. Dilfilippi on February 26, 1979, and 4) a meeting and conversation between Peters and Mr. Difilippi on March 21, 1979. Solely upon this evidence, the district court, on remand, concluded that a conspiracy existed, that Mr. Bonanno and Mr. Difilippi were members of that conspiracy, and that both defendants were thus proven guilty beyond a reasonable doubt of the conspiracy charged in Count One of the indictment.

In so finding, the district court had to first find that the test of admissibility for these statements under Rule 801(d)(2)(E), Federal Rules of Evidence has been met, so they could be attributable against each defendant as substantive evidence of guilt. This test, in the Ninth Circuit, is framed as follows:

> Federal Rules of Evidence 801(d)(2)(E) requires proof of three elements: (1) that the declaration

> be in furtherance of the conspiracy; (2) that the declaration be made during the course of the conspiracy; and (3) that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it .... *In order to prove the existence of conspiracy under the third prong of the coconspirator exception, the prosecution must establish a prima facie case through the introduction of substantial independent evidence other than the contested hearsay.* (Emphasis added).

United States v. Perez, 658 F.2d 656, 658 (9th Cir. 1981). In explaining its determination of the third factor above, the district court held that "[e]xtrajudicial statements of a defendant are admissible as non-hearsay admissions and may be properly used as evidence of conspiracy," (Appendix C, App. C-23). The Circuit, in affirming this basis for independent proof of the conspiracy, upon remand, elaborated (Appendix D, App. D-15):

> Each defendant's own recorded statements, however, provide substantial independent evidence to establish the existence of the conspiracy so as to permit the introduction of other defendant's statements.

In the "admissions" of Mr. Bonanno, nowhere is there a statement or inference by him that Mr. Difilippi was knowingly acting in concert with him to effect the alleged purpose of the conspiracy. See Appendix C, App. C-2-C-12, wherein these statements are set forth. Instead, the only inference to be drawn, upon the question of admissibility under Rule 801(d)(2)(E) is that each

defendant was seeking a common goal, and this inference can only be drawn by comparing Mr. Bonanno's statements to those of Mr. Difilippi. Thus the inference is necessarily dependent upon the contested hearsay itself.[23] As such, we submit that the district court, and the Ninth Circuit in affirming, have violated the proscription contained in this Court's opinion in *Glasser v. United States*, 315 U.S. 60, 74-75 (1942) that:

> [D]eclarations [of a co-conspirator] are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with its conspiracy. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence.

If this Court grants certiorari, on this ground, we will urge that this Court expressly announce that the *Glasser* mandate of "proof aliunde" still applies to the finding

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[23]The only added inference which remains in this evidence as to Mr. Bonanno's guilt, is that which can be drawn from Mr. Difilippi's conversations with Peters, which infer that, in the interim between February 15 (the date of Mr. Bonanno's first monitored conversation with Peters) and February 26, 1979, that Mr. Difilippi had spoken with Mr. Bonanno about the subject matter of his initial conversation with Peters. This, of course, cannot be used as independent evidence of the conspiracy and Mr. Bonanno's involvement therein, as this is not *independent* of the hearsay, i.e., Difilippi's declarations to Peters, sought to be admitted under Rule 801(d)(2)(E). Nevertheless, were certiorari granted on this issue, we would also urge that this evidence, even if admissible, is insufficient to sustain a verdict of guilt on a conspiracy charge, and thus request this Court to do justice by exercising its supervisory powers to overturn Mr. Bonanno's conviction.

necessary under Rule 801(d)(2)(E), and to elaborate upon this requirement by holding that the logic applied here by the Ninth Circuit fails to satisfy this requirement, as one Circuit has expressly so found upon similar circumstances to those in this case. *United States v. Alvarez*, 584 F2d 694, 696-699 (5th Cir. 1978).

CONCLUSION

For all of the above and foregoing reasons, Joseph C. Bonanno, Sr., requests this Court grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari were mailed to each of the following persons on this 24 day of November, 1982.

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82-877

FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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APPENDIX A

[FILED AUG 12, 1980]

[RECEIVED AUG 28 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. CR-79-170-WAI(SJ)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH C. BONANNO, SR., and JACK DIFILIPPI,
Defendants.

MEMORANDUM OF DECISION

The Court has carefully reviewed the evidence, both testimonial and documentary, and has considered the argument of counsel, and now finds:

(1) The defendants, JOSEPH C. BONNANO, SR. and JACK DIFILIPPI, and each of them, are GUILTY of the offense charged in Count 1 of the Indictment on file herein;

(2) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 2 of the Indictment on file herein;

(3) The defendant JACK DIFILIPPI is NOT GUILTY of the offense charged in Count 3 of the Indictment on file herein;

(4) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 4 of the Indictment on file herein;

(5) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 5 of the Indictment on file herein;

(6) The offense charged in Count 6 is redundant and duplicative of the offense charged in Count 5 and is DISMISSED on that ground.

(7) The defendant JACK DIFILIPPI is NOT GUILTY of the offense charged in Count 7 of the Indictment on file herein.

I.

CONSPIRACY

The record has been examined to determine whether it discloses, beyond reasonable doubt, a knowing and willful agreement to corruptly influence, intimidate or impede a witness before the Grand Jury or an agreement to endeavor to corruptly obstruct, influence or impede the due administration of justice together with proof beyond reasonable doubt of the execution of at least one alleged overt act.

I conclude that the Government has shown, beyond reasonable doubt, these necessary elements.

The record is replete with the language of agreement between defendants to influence witnesses. Examples are:

Ex. 49-1 pp. 22-27. This exhibit shows a detailed plan with respect to the most advantageous line of testimony to be given by Karen Bonanno and her father, Ted Anderson, on the subject of an approximately $6,000.00 loan, ostensibly made by Anderson to his daughter. Defendant BONANNO stated to DIFILIPPI on p. 23 of Ex. 49-1:

> "I told her, 'Don't be afraid that later I will give it to you."

Thus, the loan was to be in fact repaid by BONANNO, and it was the object of defendant BONANNO to keep the facts of this transaction from the Grand Jury. If the fact of his agreement to repay should become known BONANNO felt that it would be to his disadvantage:

> "This would sink us, this would sink me even more." Ex. 49-1, p. 23

After being enjoined to speak to Anderson with respect to the transaction – Ex. 49-1, p. 26:

> "Or else, but . . . if you see him, you talk to him, you tell him. That he controls . . . Because, to the big guy, they told him precisely this."

Following further discussion defendant DIFILIPPI said, at Ex. 49-1, p. 27:

> "But, anyway, I'll see to it tomorrow morning. Now you, you when one. . . ."

And, further at p. 27, the following colloquy with respect to Karen Bonanno:

BONANNO: "I can't say these things to her. You have to tell her."

DIFILIPPI: "No, I'll tell her, I'll tell her, I'll tell her, I'll tell her."

With further reference to the appearance of Ted Anderson before the Grand Jury, Ex. 95-1 is as follows, at p. 18:

DIFILIPPI: "And I told her the discussion that I had to tell her, and I told her 'Don't tell him tonight in case he forgets it. Tell him tomorrow morning when you're both in the car,' I told her."

And further at the same page:

DIFILIPPI: "And this is how we remained. Therefore, tomorrow morning, when I see her I'll ask if he, is his memory was refreshed, and everything."

And further at pp. 18 and 19:

DIFILIPPI: "Yeah, okay. But if she, if he if he . . . But, or else I'll tell him sternly, . . . me personally, also, if, he has to go . . . ah, ah, I mean 'You've got to do this'."

BONANNO: "And to, to who?"

DIFILIPPI: "To the little girl's father."

BONANNO: "Yeah."

DIFILIPPI: "To the 'little one's' wife."

BONANNO: "But he, that, that you have to tell her to tell her father?"

DIFILIPPI: "No, I told her to tell her father."

BONANNO: "Yeah."

DIFILIPPI: "Because I still haven't seen the father."

BONANNO: "Yeah."

DIFILIPPI: "Now, tomorrow morning I'll see him."

BONANNO: "Yeah."

DIFILIPPI: "And before he appears before 'the Mollica'."

BONANNO: "Yeah."

DIFILIPPI: ". . . I'll also tell him."

BONANNO: "It's understood."

DIFILIPPI: "That's all. And whatever happens, happens."

And further at p. 24:

BONANNO: "All right, speak with the father of what's her name."

DIFILIPPI: "Okay."

BONANNO: "All right?"

DIFILIPPI: "Okay."

These excerpts illustrate the basic agreement and understanding between the defendants that prospective witnesses be briefed in advance of their testimony.

While there is little apparent queston as to whether the plan to program witnesses was willful and knowing on the part of the defendant BONANNO, any doubt which may exist is pretty well removed by the testimony of defendant DIFILIPPI reported at 30 RT 2885, lns. 21-14:

> Q. "But you understood from these discussions with Mr. Bonanno that he wanted you to talk with these witnesses and have them testify in a certain way?"
>
> A. "Yeah. Yeah."

While MR. DIFILIPPI testified that his apparent agreement to speak with witnesses was made for the sole purpose of mollifying defendant BONANNO (30 RT 2887 lns. 14-17):

> Q. "All right. And the way you misled him was to make him think that you were going to talk to these witnesses when actually . . ."
>
> A. "To make him happy."

This claimed purpose is belied by MR. DIFILIPPI'S conduct in his discussions of the prospective testimony of witness Peters before the Grand Jury. If it can arguably be said that DIFILIPPI might have had a reason to humor and cajole BONANNO, he certainly had no reason to do the same with Peters. In Ex. 112-1, p. 23, DIFILIPPI and Peters discuss an appropriate hiding place for the records of the car transaction purportedly removed by Peters from the books of his agency. In Ex. 112-1, pp. 28-31 Peters and DIFILIPPI discuss a format of testimony designed to explain the February 15, 1979 call by Peters to BONANNO. These conversations are strong evidence of the specific intent of DIFILIPPI to fully participate in the planning of inaccurate or false testimony. This conduct on the part of DIFILIPPI is wholly inconsistent with his claim that his apparent language of acquiesence to BONANNO'S requests that he talk to prospective witnesses was the product of his solicitude for an aging, sick and perhaps senile relative.

In the course of his testimony at the trial, (see, 30 RT 2807, ln. 14—2808, ln. 3) DIFILIPPI explains his suggestion with respect to the hiding of the purportedly abstracted records on the basis of a suspicion which he entertained concerning the motivation of Peters. In the same volume, p. 2809, ln. 3—2810, ln. 2, DIFILIPPI'S assistance to Peters in the hiding of the purported records is explained on a similar basis.

In order to accept such an explanation of that conduct and the explanations given by DIFILIPPI as to the several agreements on his part to speak to witnesses the Court would have to conclude that these men never meant what they said and what they did was not what it seemed to be. Counsel for defendant

BONANNO acknowledged as much when he stated in argument:

> "Your Honor, how can these notes or conversations be accepted at face value? We have clear empirical proof—empirical proof—that what these people are saying to one another is not necessarily what they mean." (32 RT 3112, lns. 1-4)

The Court is asked to find a reasonable doubt on the basis that BONANNO and DIFILIPPI tried to manipulate each other and that DIFILIPPI tried to manipulate Peters for purposes other than those alleged in the Indictment. The clear purport of words and acts belie the argument.

It is contended on the basis of the DiFilippi-Peters conversations of February 22 and 23, 1979, that DIFILIPPI did not know prior to Peters' purported February 22 appearance before the Grand Jury of the Bonanno-Peters call of February 15, 1979. Therefore it is argued that DIFILIPPI, not knowing, was no conspirator, did not criminally agree, and that the Peters episode is therefore without probative value in support of the Government's case on the issue of conspiracy.

The conversation of February 22, 1979, Ex. 108-1, on pp. 4-7, includes a discussion of Peters' scheduled appearance before the Grand Jury. There DIFILIPPI states, pp. 5 and 6, in substance, that those who advise prospective witnesses with respect to testimony may incur criminal culpability. He states at p. 6 that Peters should talk, and not speculate, with respect to anything that took place between Peters and the Bonanno sons. At pp. 11 and 12 the telephone call of February 15,

1979, is discussed. At p. 28 DIFILIPPI tells Peters not to call BONANNO any further. From these passages an inference may be drawn that there had been no communication between defendants concerning the telephone conversation of February 15.

The conversation of February 23, 1979, is defendant Difilippi's Ex. H. On pp. 16 and 17, there is a discussion of Peters' February 22 Grand Jury appearance, in the course of which DIFILIPPI indicates that the Grand Jury's request of Peters for transaction records involving the BONANNO sons is no problem because Peters has them. An inference against DIFILIPPI'S knowledge of the February 15 phone conversation can be strongly drawn from that passage.

The problem with the argument is created very forcefully by Ex. 111-1, p. 109, which is a part of a recorded conversation which occurred on February 26, 1979. In neither Ex. 108-1 nor DIFILIPPI Ex. H is there any affirmation or denial of the telephone conversation of February 15. The parts of the conversations in those exhibits which have been referred to are simply not consistent with knowledge by DIFILIPPI of the February 15 phone call. But in Ex. 111-1 there is a clear affirmation of actual knowledge on the part of DIFILIPPI. (p. 109) The words referred to were spoken after DIFILIPPI asked that the radio be turned on as follows:

> DIFILIPPI: "Put the thing on. Over there . . . You know, he is waiting for my call before he calls you."
>
> PETERS: "He, he's waiting for . . . ."

DIFILIPPI: "After you called him, he called me. And he says to me, he says, uh, he has been calling. I says, you know I can't talk on this fucking phone."

PETERS: "But I didn't talk to him at his, his house. Okay, okay.

DIFILIPPI: "You know that but you see he had to go out and use a pay phone to talk to you, to the dealership. He could not talk from his house."

PETERS: "Yeah, okay. Then he, he called you after he called me? I mean after I called him."

DIFILIPPI: "Right, right."

DIFILIPPI then goes on to accurately summarize the conversation of February 15 and provides an explanation which, if believed, pretty well destroys the inferences referred to arising from Ex. 108-1 and DiFilippi H.

In sum, the Peters episode leaves no room for reasonable doubt as to the intent of both defendants or *as to conspiratorial activity.*

Both defendants urge that the conduct employed by Peters with the apparent blessing of the Government is so reprehensible as to rise to the level of affirmative governmental misconduct. I do not find it so, undercover work is inherantly a dirty business in some respects. It may be that innocent persons who were approached as possible investors in the Barchetta transaction were financially and personally taken advantage of to some extent. If they were, this can hardly be raised in defense by defendants herein.

Because of the means of memorialization the Peters incident speaks clearly for itself, as far as the issues in this case are concerned.

Without proceeding exhaustively to quote exhibits further, the following excerpt citations are illustrative of conversations between the defendants tending to show spoken agreement to influence witnesses:

> Ex. 39-1, pp. 19, 23, 31; Ex. 48-1 pp. 7, 8, 41-43; Ex. 49-1 pp. 19-27; Ex. 52-1 pp. 34, 36, 37; Ex. 95-1, p. 27.

I find that defendant BONANNO was not senile. There is no competent evidence to that effect. There is no competent evidence that he was at the time and place in issue incapable of forming and entertaining the requisite degree of intent.

On the basis of all the evidence in this case, including those several items hereinabove referred to I find that, beyond reasonable doubt defendants BONANNO and DIFILIPPI are GUILTY of the offense charged in Count 1 in that they and each of them conspired to endeavor to influence witnesses before the Grand Jury to give false testimony and to withhold evidence concerning the nature and source of assets of the businesses under investigation, evidence as to assets and income of individuals associated with the business under investigation, to falsely deny to the Grand Jury communications between the defendants concerning the Grand Jury investigation or concerning other witnesses before the Grand Jury, and to endeavor to influence witnesses to falsely deny defendants' corrupt efforts to influence them.

In furtherance of the purposes and objectives of the said conspiracy, beyond a reasonable doubt each of the following overt acts were committed by one or more of said defendants:

A-E, F, M, N (in respect to Count 2 only), O, Q, R. T, U, V, W (as to Counts 4 and 5 only).

II.

PERJURY

Defendant DIFILIPPI is NOT GUILTY of the offense charged in Count 3 because there is a reasonable doubt as to whether he swore falsely.

Defendant DIFILIPPI is NOT GUILTY of the offense charged in Count 7 because there is a reasonable doubt as to whether he swore falsely.

Count 6 of the Indictment is redundant and duplicative of Count 5 and essentially asks the same question concerning the same subject matter as does Count 5. Count 6 is therefore dismissed on that ground.

Defendant DIFILIPPI is GUILTY of the offenses charged in Counts 2, 4 and 5 of the Indictment.

Anger and frustration do not negate knowing and willful conduct, and no authority is cited to the contrary. In any event, DIFILIPPI has stated that he was offered an opportunity to recant or change false testimony and did not. Ex. 39-1, p. 14.

The testimony sought was relevant and material to one aspect of the Grand Jury's investigation and the knowingly false answers tended to impede that aspect of the investigation. (1 TR 20, lns. 19-24).

Dated:

WILLIAM A. INGRAM

WILLIAM A. INGRAM
United States District Judge

APPENDIX B

[FILED DEC 9 1981]

[RECEIVED DEC 14 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-1020/1021

UNITED STATES OF AMERICA,
Plaintiff/Appellant

vs.

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI
Defendants/Appellee

Appeal from the United States District Court
for the Northern District of California,
Hon. William A. Ingram, presiding

Argued and Submitted September 17, 1981

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

ORDER

Upon its own motion, the court remands this matter for 21 days to the district court for the limited purpose

*Hon. Richard B. Kellam, United States District Judge, Eastern District of Virginia, sitting by designation.

of making specific findings as to the basis for the court's judgment that defendants DiFillipi and Bonanno were guilty of conspiracy to obstruct justice. In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court shall conduct a hearing to consider additional argument on this limited issue.

The parties may file supplemental briefs addressing this issue within 14 days of any finding made by the district court pursuant to this order of limited remand.

Upon receipt of the court's findings and any supplemental briefs submitted by the parties, this matter will be resubmitted to this panel for decision.

APPENDIX C

[FILED JAN 11 1982]

[RECEIVED JAN 13 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NOS. 81-1020/1021
USDC CR-79-170-WAI(SJ)

UNITED STATES OF AMERICA,
Plaintiff/Appellant,

v.

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI,
Defendants/Appellee.

DECISION

This matter comes before the Court on limited remand from the United States Court of Appeals for the Ninth Circuit, for the purpose of the making of findings in accordance with the following direction of the Court of Appeals:

> "In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court

shall conduct a hearing to consider additional argument on this limited issue."

Pursuant to the foregoing direction, on December 23, 1981, I conducted a hearing for the purpose of receiving further argument. The United States of America appeared by and through its counsel Craig Starr, Esq.; defendant Joseph C. Bonanno, Sr. appeared by and through his counsel Albert J. Krieger, Esq.; and defendant Jack DiFilippi appeared by and through his counsel Frank Ubhaus, Esq. All counsel argued. The United States filed a briefing memorandum, and the matter was submitted.

After consideration of the argument of counsel, all relevant exhibits, portions of the record, and the briefing memorandum filed by the United States, I find as follows:

1. Louis Peters and Joseph C. Bonanno spoke by telephone on February 15, 1979. Peters told Bonanno that he had been subpoenaed to appear before the Grand Jury and that he was concerned with respect to a transaction consisting of Peters' sale of a Cadillac auto for cash for Bill Bonanno, Joseph Bonanno's son. In the course of the conversation, Joseph Bonanno suggested that Peters withhold the records of that transaction from the Grand Jury. Ex. 105-2. Specifically, the following conversation occurred:

BONANNO: Everything else is, except to, uh, cars, business, payments, you know?

PETERS: Uh huh.

BONANNO: Nothing, nothing, nothing wrong. Just say the boy never bought anything. You know, cars (laughter).

PETERS: No, no, but uh, I'm thinking of the uh, uh, uh of the tall one, when I, uh . . .

BONANNO: Yeah, yeah, but uh, you can't tell them that you give a that. Otherwise you will ruin him.

PETERS: Yes.

BONANNO: Absolutely. That's what they're looking for.

PETERS: Uh huh, uh, okay. What should I say?

BONANNO: Well, I mean, uh, uh, you, you, will talk to them, anything, because, uh, because was, uh, a transaction. That's all.

PETERS: Yeah.

BONANNO: Yeah.

PETERS: Okay. Uh, what, what should I do now, if uh, they give me a subpoena for the records?

BONANNO: For the records?

PETERS: Yes.

BONANNO: Do you have any records there?

PETERS: Yes.

BONANNO: And what do the records say?

PETERS: Well it shows that, uh, uh, around $9,700 in cash was turned over. On the sale of a, of a Cadillac.

BONANNO: Yeah. On the sale of a Cadillac? Does it says, why you turned over for them?

PETERS: Uh, I'm sorry.

BONANNO: Where does, does it say why you uh, you, you was turn over, uh, this money to him?

PETERS: If they should ask me why?

BONANNO: Yeah.

PETERS: Uh, this, uh, I don't know what, what, you know, I'm, I don't know what to say. That's why, that's why I wanted to talk to you.

BONANNO: Yeah. But I mean, this is, I don't know. I never knew this. Right?

PETERS: Yeah.

BONANNO: I never knew this.

PETERS: Uh huh.

BONANNO: I never knew this.

PETERS: Uh huh.

BONANNO: And I never know.

PETERS: But if, if, they see, you know, if they, if they subpoena the records.

BONANNO: Yeah.

PETERS: It'll, it'll be there, that uh, you know, that Bill received that uh, uh, the money on the sale of a Cadillac in cash.

BONANNO: Yeah, yeah, but uh, but can, uh, this be taken out or what?

PETERS: What's that?

BONANNO: Could be taken out, or what?

PETERS: Uh, could the records be taken out?

BONANNO: Yeah.

PETERS: Yes.

BONANNO: Sure, that's all. They don't have to know.

PETERS: Okay.

BONANNO: Yes. That's the only, play safe, you know. Because if you do, you do, uh, something. It's not a question of wrong. You ruin him, you know?

Ex. 105-2, pp. 7-10.

Further, in the same conversation the following was said:

BONANNO: You, you gotta pull that, that thing completely out. You know?

PETERS: Okay.

BONANNO: He says, about you had, the tall guy, you had and I says, well, if he has, I think he had a car, but I don't know. It is not up to you to answer, you know?

PETERS: No, I, yeah.

BONANNO: They know where to go. You know?

PETERS: Hmm, hmm.

BONANNO: And only him can, can explain.

PETERS: Yes, yes, I understand.

BONANNO: Eh, eh, see?

PETERS: I didn't, I didn't sell him the car, so I don't know anything about it.

BONANNO: That's right, that's right, that's right, exactly.

Ex. 105-2, pp. 12 & 13.

Further, in the same conversation:

PETERS: Well, this, this is why I called, so that . . .

BONANNO: Alright.

PETERS: You know, so I would know exactly what to do.

BONANNO: Yeah, well you never talked to me, you know.

PETERS: Huh?

BONANNO: If they say, uh, before you came here, before the jury, did you talk, uh, with the old man? I says, what do you mean, uh, talk?

PETERS: Well what, what are they talking about? I don't know what they're talking about.

BONANNO: Huh?

PETERS: I don't know what they're talking about.

BONANNO: That's right. Because we know that you call uh, eh, at that time. You know, maybe the telephone call, the last time, eh, or before. You know?

PETERS: Yeah, well, I, I wished, uh, I wished, uh, I wished Mrs. B. a happy Valentine's Day.

BONANNO: A happy Valentine's Day? Yeah, because you, you said you, I, I always call to, to, to know, how he feels.

PETERS: Yes.

BONANNO: That's right.

Ex. 105-2, p. 17.

Further, in the same conversation:

BONANNO: So, at this moment, on this moment, we'll do this. At this moment, that, ah, you pull that thing out there completely, huh?

PETERS: I'll pull it out like you want me to. Yes, sir.

BONANNO: Yes. And then save it in someplace very good, you know?

PETERS: Sir?

BONANNO: You save it in a place, in a good spot, you know?

PETERS: Thank you, sir.

BONANNO: This is temporary, you know?

PETERS: Yes, sir.

BONANNO: And then if a, if in case we want to destroy, you destroy after. Huh?

PETERS: Huh, uh, I can't hear you, sir.

BONANNO: If it's got to be destroyed, burn after, you do after.

PETERS: Yes, sir.

Ex. 105-2, pp. 21 & 22.

Further,

BONANNO: Alright, so bout just about, pull out that, that thing, you know?

PETERS: Sir?

BONANNO: Pull out the paper. Huh?

PETERS: Ya, I'll, I'll take out the paper from the, uh, the Cadillac.

BONANNO: Yeah, that's right.

PETERS: And a, destroy it.

BONANNO: No, no only for, for that, huh?

PETERS: Yes, sir.

BONANNO: And then, you save it good.

PETERS: Yes, sir, they won't know anything about it.

BONANNO: That's right, not in your house, you know.

PETERS: No, sir.

Ex. 105-2, pp. 22 & 23.

Further,

BONANNO: It is better to avoid anything until my situation is clear, you know?

PETERS: Yes, I, I not, I understand.

BONANNO: And then I will call, eh?

PETERS: Okay, sir.

BONANNO: And then if you say John, uh, you know what we say.

PETERS: Ya, yes, sir.

BONANNO: Alright, then we do that.

PETERS: Okay, thank you, sir.

BONANNO: At this moment, uh, do this. This moment do this. Uh, pull out, take out the paper.

PETERS: Yes.

BONANNO: Uh, bring it some place, until uh, then, then, then you burn after, huh?

PETERS: Alright.

BONANNO: Okay.

PETERS: Yes, sir.

BONANNO: You know, so, so, I will think a couple of days it over on this case, heh?

PETERS: Okay, I'll, I'll take it out right now.

BONANNO: Yes, yes.

PETERS: Uh huh.

BONANNO: But listen, don't bring home, you know?

PETERS: No, no, I'll uh . . .

BONANNO: Yes.

PETERS: I have a place that I can lock it up.

BONANNO: Alright. Okay, fine. Now then, give me a little time, and then uh, we will go on that, uh, again, eh?

PETERS: Yes, sir.

BONANNO: Eh, someday I will call you again, huh?

PETERS: Okay, uh, okay, yes, sir.

BONANNO: Alright?

PETERS: Yes, sir, I'll, I'll look for your call.

BONANNO: Yes, in case, uh, in case I will call and say John, and you're not there, and tell, tell, uh John, I will call again at first time.

Ex. 105-2, pp. 24-26.

Further,

BONANNO: Alright. So about this visit, don't talk with anybody, please.

PETERS: No, no, sir.

BONANNO: If they say, do you talk to witnesses, I mean, I let's not repeat, okay?

Ex. 105-2, p. 26.

2. Between February 15, 1979, and February 22, 1979, Joseph C. Bonanno and Jack DiFilippi spoke by telephone concerning the February 15th conversation between Peters and Joseph Bonanno. RT 2982, 2983; Ex. 111-1, pp. 109, 110.

3. On February 22, 1979, Peters and Jack DiFilippi met in Stockton, California, at Peters' apartment. Ex. 108-1; RT 1407 *et seq.*; 2898 *et seq.* Peters did not reveal to DiFilippi any of the details of his conversation with Bonanno of February 15, 1979. Ex. 108-1, pp. 12, 13.

4. On February 26, 1979, Peters and DiFilippi met at Peters' apartment in Stockton, California. Ex. 111-1. In the course of the conversation, a cash transaction between Peters and Bill Bonanno for the purchase of a Cadillac automobile was discussed. Ex. 111-1, pp. 101-103.

5. In the course of the conversation of February 26, 1979, Ex. 111-1, pp. 109, 110, the following occurred:

PETERS: Yeah, okay. Then he called you after he called me? I mean after I called him?

DIFILIPPI: Right, right.

PETERS: Okay.

DIFILIPPI: And uh, he told me you were concerned with this, uh, with the Cadillac, and the papers and something else in regards to Bill.

PETERS: Um hum.

DIFILIPPI: And, uh, he says to you, if that's what you think will hurt him then take everything out of there is you can.

PETERS: Um hum.

DIFILIPPI: And he says don't worry about it. I'll take care of it.

PETERS: I did.

DIFILIPPI: Alright. Now I didn't tell you anything the other day because I was waiting for you to tell

me, but today I want, I don't want to make a mistake over nothing.

At p. 114:

DIFILIPPI: Yeah, but today they, they could come with a search warrant.

PETERS: For what? Okay. I was waiting for the call because he told me . . .

DIFILIPPI: Um hum. He hasn't called you because he wants to talk to me first.

PETERS: Okay, okay. I got all, I got the original, the duplicates of all the checks. I've got everything okay. I was gonna burn it to get rid of it. Uh, that's probably what he should do cause there's no records up there now. I don't know anything about the car because I never sold it to Bill. I don't know where the hell it is. How the hell would I know. See, maybe four or five years from now, maybe, the car will be registered. But now its running around on dealer plates.

DIFILIPPI: You got the original plates?

PETERS: No original plates, dealer plates. Original plates are gone.

DIFILIPPI: Nobody will say in your shop that they saw the car in and out?

PETERS: No they can't remember. Jack, there's too many care coming in and out. Hell, I can't

remember what cars. I can't even tell you what's on the lot today. We sell, shit, a hundred and fifty cars a month. There's no way you can keep track of them. You, you got to be kidding. What car? Name any car I sold last, I couldn't tell you.

DIFILIPPI: Well, I have to go and see him. And then after, after, when I, I, got to come back over here. Okay?

PETERS: Do you want?

DIFILIPPI: What?

PETERS: What, what.

DIFILIPPI: The papers?

PETERS: Just so you could show him. I don't know. See if, uh.

DIFILIPPI: No, no, no, no. Keep the papers. Don't, don't keep the papers for the time being, but save the, save the papers.

PETERS: Do you wish that I put them, safety deposit box or something?

DIFILIPPI: No, no, no, no. Worse yet.

PETERS: Well, where can I put them? Why don't you hold them for me? I don't know. Where can I put them. You tell me.

DIFILIPPI: I don't know. Just, just keep them for the time being. Keep them for the time being. The, uh . . .

PETERS: Okay, but now, you said that they could subpoena here.

DIFILIPPI: Well, uh. To go to trial first you got to go in front of Grand Jury, with it and the, uh, then uh, if they, if they think something is screwy, you know, well then . . .

PETERS: Then they could.

DIFILIPPI: And then they might. By the time we uh . . .

PETERS: See, we got, uh, what seven, what's today?

At p. 116:

PETERS: But you see, I didn't know what to do and I'd do anything for Mr. B. I would do it for you if you asked me.

DIFILIPPI: Well, I'll have to see anyway.

PETERS: Okay, you know.

DIFILIPPI: In a few days, okay?

PETERS: Yeah.

DIFILIPPI: And then I, I'll come back to you, okay?

PETERS: Okay, I thought what I did was right.

DIFILIPPI: That, that, that's, that's right but I don't see how it could hurt him. I don't see how.

On February 26, 1979, in the late afternoon, DiFilippi helped Peters hide the records in the latter's apartment. Ex. 112-1.

Peters testified as follows, at RT 1438 & 1439:

Q. Mr. Peters, in the last part of the conversation, which is on page 13 of the transcript, and that we just heard, there is Mr. DiFilippi saying "Yeah, now where is the dirty linen that you got over here?"

You say, "Yeah, where is it, I got a pile."

And both of you disappear from view of the camera, is that correct?

A. That's correct.

Q. Now, what was happening at that moment?

A. We took the original copies of the sale of the car and the check that was in the folder and went into the hall and into my bedroom.

Q. Now where were these documents before you went into your bedroom?

A. They were on the table in the briefcase.

Q. They were in your briefcase?

A. Yes.

Q. All right, and you got them out of the briefcase?

A. Yes.

Q. And then the two of you went into your bedroom?

A. That's correct.

Q. And what happened in there?

A. From there we went into the walk-in closet and I handed Jack the folder, and he says "put it underneath the box up on the top shelf."

Q. Wait a minute. Did he take the folder from you at that point?

A. Yes, he did.

Q. All right.

A. And I lifted up the box and he couldn't reach it, so then I took the folder and put it underneath the box on the self.

6. On March 21, 1979, DiFilippi met with Peters, and the following conversation occurred. Ex. 113-1, pp. 10 & 11:

DIFILIPPI: In other words, if, if he asks you to bring down the records and everything that was Bill and Joseph's transaction, whatever the nature they are, right or wrong?

PETERS: Everything, yes.

DIFILIPPI: Everything.

PETERS: Yes.

DIFILIPPI: You take everything with you. Including that car, the Cadillac.

PETERS: Okay.

DIFILIPPI: Okay, and, ah, suppose they would ask you the question if uh, if uh, you got, you got paid in cash or check. You don't recall that. How you got paid.

PETERS: Alright, you want me to say that if, they ask me . . .

DIFILIPPI: Uh huh.

PETERS: Did I get paid in cash or . . .

DIFILIPPI: Or check.

PETERS: Or check.

DIFILIPPI: Not that you got paid in cash or check. Did you pay him?

PETERS: Did I pay him in cash or check?

DIFILIPPI: You don't recall that.

PETERS: You want me to say I don't recall.

DIFILIPPI: You don't recall it. I mean, you don't recall because of those things. I mean. That, it, it could be, isn't it?

PETERS: Yeah.

DIFILIPPI: Normal transaction as you know.

7. On March 21, 1979, DiFilippi suggested to Peters answers to be given to the Grand Jury by Peters if the latter were asked if he had talked to DiFilippi concerning his testimony. Ex. 113-1, pp. 59-61.

On the basis of the foregoing evidence I conclude as follows:

1. Joseph C. Bonanno and Jack DiFilippi beyond a reasonable doubt conspired and agreed to induce Lewis Peters to conceal from a Grand Jury duly empanelled in the Northern District of California, documentary evidence pertaining to an automobile transaction wherein Peters sold a Cadillac automobile belonging to Bill Bonanno and paid the proceeds of said sale to Bill Bonanno in cash.

2. Joseph C. Bonanno and Jack DiFilippi conspired and agreed to influence the testimony before said Grand Jury of Lewis Peters with respect to said transaction.

3. In furtherance of the conspiracy and agreement between Joseph C. Bonanno and Jack DiFilippi, DiFilippi advised Peters to hide the records in question and physically aided Peters in hiding them in Peters' apartment. Testimony of Peters, Ex. 112-1.

4. In furtherance of the conspiracy and agreement Jack DiFilippi instructed Lewis Peters as to how to answer questions put before the said Grand Jury and how to answer questions put with respect to conversations between Lewis Peters and Jack DiFilippi, and specifically to state that such conversations occurred a year prior to the Grand Jury testimony of Peters, and specifically to state that Peters could not specifically recall whether he had paid the proceeds of the automobile sale to Bill Bonanno in cash or by check. Ex. 113-1.

5. The agreement and conspiracy by and between Jack DiFilippi and Joseph C. Bonanno, Sr., is circumstantially demonstrated by each of the following:

(i) Bonanno gave Peters instructions with respect to the retrieval and concealment of the records of the automobile sale transaction on February 15, 1979. Ex. 105-2.

(ii) DiFilippi and Bonanno spoke by telephone between February 15, 1979 and February 22, 1979, and discussed the Peters-Bonanno phone call of February 15, 1979. 41 RT 2894-2901; Ex. 111-1, pp. 109, 110.

(iii) In the course of the DiFilippi-Peters conversation of February 22, 1979, Ex. 108-1, Peters did not reveal any of the details of the Peters-Bonanno conversation February 15, 1979, to DiFilippi.

(iv) In the course of the DiFilippi-Peters conversation of February 26, 1979, Ex. 111-1, DiFilippi repeated all of the details of the Bonanno-Peters conversation of February 15, 1979, thus corroborating his statement that he had a conversation with Bonanno prior to February 22, 1979, concerning the Peters call of February 15, 1979. Ex. 111-1, p. 110.

(v) The instructions given by Bonanno on February 15, 1979, Ex. 105-2, with respect to disposition of the records, and by DiFilippi on February 26, 1979, Exs. 111-1; 112-1, are virtually identical.

(vi) Jack DiFilippi expressed his opinion that the records in question were not harmful to the interests of Bill Bonanno, Ex. 111-1, p. 116, thus negating any inference that his overt activity was performed independently and alone and pursuant to his own intent and design as distinguished from conspiratorial activity.

6. A conspiratorial agreement may be proven by circumstantial evidence. *Glasser v. United States*, 315 U.S. 60 (1945).

"Participation in a criminal conspiracy need not be proved by direct evidence; a common

purpose and plan may be inferred from 'a development and a collocation of circumstances.'"
315 U.S. at 80.

7. The facts above-referred to which circumstantially demonstrate the formation of a conspiratorial agreement are not equally consistent with a reasonable hypothesis of innocence.

8. Extrajudicial statements of a defendant are admissable as non-hearsay admissions and may be properly used as evidence of conspiracy.

United States v. Perez
658 F.2d 654 (9th Cir. 1981)

United States v. Cawley
630 F.2d 1345 (9th Cir. 1980)

United States v. Weiner
578 F.2d 757 (9th Cir.), *cert. denied*,
439 U.S. 981 (1978).

9. The totality of the evidence above reviewed demonstrates a specific intent on the part of defendants and each of them to obstruct and impede the function of a Grand Jury by preventing knowledge by the Grand Jury of the source and nature of assets and capital received by persons then under investigation by the Grand Jury and to prevent the Grand Jury from learning of corrupt endeavors to keep such material facts from the knowledge of the Grand Jury.

10. The instructions by DiFilippi to Peters contained in Ex. 111-1 and in Ex. 113-1, and the acts of DiFilippi in

physically aiding Peters in the hiding of records as recounted in the testimony of Peters and of DiFilippi and otherwise demonstrated by Ex. 112-1, each constitute overt acts undertaken and performed for the purpose of furthering and accomplishing the unlawful purposes of the conspiracy. Each of said overt acts was proven beyond a reasonable doubt.

11. None of the overt acts so proven are alleged in the Indictment, and none of the overt acts which are alleged in the Indictment were proven by the evidence herein discussed.

A conspiracy conviction may rest upon proof of an overt act not charged in the Indictment, unless the resulting variance affects the substantial rights of the defendant. *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967).

While this aspect of this case is troubling, it is noted that in evaluating the effect of the variance upon the rights of the defendant the *Brulay* court evaluated such things as absence of objection to the admission of evidence of the unalleged overt act, absence of claim of surprise, absence of motion for bill of particulars, and no showing of any lack of knowledge on the part of defendant and his counsel of the evidence supporting the unalleged overt act.

Other circuits have taken a similar view. *See United States v. Armone*, 363 F.2d 385 (2nd Cir. 1966); *Napolitano v. United States*, 340 F.2d 314 (1st Cir. 1965); *Culp v. United States*, 131 F.2d 93 (8th Cir. 1942); *Worthington v. United States*, 1 F.2d 154 (7th Cir.), *cert. denied*, 266 U.S. 626 (1924); 72 Harvard L.R. 920, 992, 993 (1959).

In the instant case, the record does not reveal any claim of surprise or claim of lack of knowledge on the part of either defendant of the evidence supporting the unalleged overt act. There was discussion of the possibility of outrageous prosecutorial misconduct with respect to the Peters incident, and of a possibility of entrapment, and of possible noncompliance with Federal Bureau of Investigation standards concerning undercover agents. From the argument presented on December 23, 1981, it is apparent that the defendants regarded the Peters incident evidence as having been offered for the purpose of proving specific intent and not of acts taken in furtherance of the conspiracy alleged in the Indictment. However, none of the above, or any other objections indicate any deprivation of knowledge on the part of defendants of the existence of the evidence and knowledge of it. I, therefore, conclude that the variance resulting from the proof of the unalleged overt act does not substantially and unfairly affect the substantial rights of defendants or of either of them.

12. I conclude on the basis of the above that there is sufficient evidence beyond reasonable doubt of the guilt of defendants and each of them apart from evidence seized as a result of the search of the defendant Bonanno's trash.

Dated: 1 11 82

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

APPENDIX D

[FILED JUL 30 1982]

[RECEIVED AUG 2 1982]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1020
81-1021
D.C. No. 79-701-WAI-SJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding
Argued and submitted September 17, 1981

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

MEMORANDUM

Joseph C. Bonanno, Sr. (Bonanno) and Jack DiFilippi were indicted for inter alia, a conspiracy to obstruct

*Hon. Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

justice. The trial judge, sitting without a jury, found Bonanno and DiFilippi guilty of the charged conspiracy. DiFilippi was also found guilty of several counts of perjury. Bonanno and DiFilippi have appealed the verdict on the conspiracy charge in the matter before this court.

DISPOSITIVE ISSUES

The present posture of this matter presents the following issues.

One. Was there a fatal variance between the overt acts which were pleaded and the overt acts relied upon by the district court in finding the defendants guilty of conspiracy to obstruct justice solely on the Peters transactions?

Two. Was there sufficient competent evidence to sustain a conviction for conspiracy to obstruct justice?

Three. Was the evidence concerning Peters fruit of the poisoned tree or independently, or inevitably discovered?

PERTINENT FACTS

A. Background

Review of this matter on appeal has been complicated by the fact that the government presented evidence of separate transactions in support of its theory that Bonanno and DiFilippi conspired to obstruct justice. The district court based its finding of guilt upon evidence concerning transactions with Louis M. Peters.[1] Accordingly, a review

of the facts involving Peters and the theory articulated by the government is necessary to determine the merits of the variance issue discussed *infra*.

In December, 1975, agents of the Arizona Drug Control District and the FBI began removing and inspecting the trash of Bonanno by removing the contents of his refuse container and replacing it with other material. Scraps of torn paper containing notes made by Bonanno were reconstructed, read, and analyzed by both state and federal authorities. The information thus procured was used in October, 1978, to obtain court permission pursuant to 18 U.S.C. §2516 (authorization for interception of wire or oral communications) to conduct interceptions of Appellants' communications over Bonanno's home phone. It was also used in obtaining a warrant to search Bonanno's home in March, 1979. The search of Bonanno's trash continued for a period of over three years, until April, 1979.

In June, 1977, Peters, the owner of a car dealership in Lodi, was approached with an offer to buy his dealership. RT: Vol. 29, pp. 1323-24. The prospective buyer, Elmer Birch, drove Peters to a meeting that included Joseph Bonanno, Jr. and Salvatore Bonanno (Bill Bonanno) (Salvatore was also known as Bill). RT: Vol. 12, p. 12. After the meeting, Birch took Peters back to the car dealership. Peters then drove to the home of Mark Yates, Chief of Police of Lodi, and told him of the meeting. *Id.* at 1326. Two days later Peters met with FBI agents to discuss the meeting. Shortly thereafter Peters agreed to cooperate with the FBI. *Id.* at 1229-30.

The FBI installed equipment for the consensual monitoring of Peters' telephone conversations. Peters developed a friendly relationship with Bill Bonanno and Appellant Jack DiFilippi. Peters recorded many of his numerous meetings and conversations with them over the next two years. By early February, 1979, the FBI decided to terminate Peters' role as an informant because no evidence of criminal activity had been developed. RT: Vol. 29, pp. 1392-93; Vol. 31, pp. 1548-49. FBI agents arranged for Peters to be subpoenaed to appear before the grand jury so that he could withdraw from his associations with the Bonannos, DiFilippi, and the others, without disclosing his cooperation with the government. Peters was instructed by the FBI to call Bonanno to tell him of the subpoena. *See id.*

On February 15, 1979, a subpoena was issued for Peters to appear before the grand jury in San Francisco, California. RT: Vol. 29, pp. 1392, Ex. 105-2 at 1. The grand jury was investigating the activities of Bonanno's two sons, Bill and Joseph. Brief for Appellant Joseph C. Bonanno, Sr. at 11. The day Peters received the subpoena, he called Bonanno to tell him. *See* RT: Vol. 29, pp. 1394-95. When Peters talked to Bonanno, Peters explained that he had something very important to tell Bonanno. Ex. 105-1 at 2. Bonanno arranged to call Peters back from a public telephone. *See id.* pp. 3-4. Both the first and the second conversations were recorded. RT: Vol. 29, p. 1394.

During the second conversation that Bonanno and Peters had, they discussed what Peters should do about the subpoena. According to the taped conversation, Peters indicated to Bonanno that he was concerned about a Cadillac he had sold for Bill Bonanno. Ex. 105-2

at 2.[2] Bonanno concluded the conversation with an admonition to Peters not to reveal that it had occurred.[3] DiFilippi testified that Bonanno talked with DiFilippi during the time period between Bonanno's conversations with Peters on February 15, 1979, and February 22, 1979. *See* RT: Vol. 41, p. 2897-99. DiFilippi and Bonanno discussed the conversations Peters had with Bonanno and the problem of the Cadillac sale. *Id.* DiFilippi also testified that when he asked Peters what had happened, Peters replied that he could not tell DiFilippi. *Id.* at 2899. Four days later, on February 26, 1979, DiFilippi met with Peters; their conversation was recorded. DiFilippi explained that he had not said "anything the other day because I was waiting for you to tell me . . . ." Ex. 111-1 at 110. DiFilippi explained to Peters that Bonanno had called him after Peters talked with Bonanno. *Id.* at 109. DiFilippi then talked about the problem of the Cadillac sale.[4]

Peters testified that later in the day on February 26, 1979, a second conversation between Peters and DiFilippi was recorded. During this conversation, they discussed how Peters should testify before the grand jury.[5]

Peters testified that the next day DiFilippi helped Peters hide records pertaining to the sale of the Cadillac in Peters' closet. RT: Vol. 30, pp. 1437-39.

On March 21, 1979, DiFilippi suggested answers Peters should give to the grand jury about the Cadillac transaction.[6] DiFilippi also suggested answers to be given if Peters were asked whether he had talked to DiFilippi and if so, what they had talked about.[7]

On April 26, 1979, a grand jury indictment was filed charging that Bonanno and DiFilippi inter alia, "knowingly, willfully, and unlawfully combined, conspired, confederated, and agreed together and with others known and unknown to the grand jury to corruptly obstruct justice, in violation of Title 18, United States Code section 1503." The overt acts listed in the indictment do not include any references to Peters.[8]

B. The Prosecution Trial Theory

In the government's opening statement, prior to the presentation of the government's case in chief, the trial judge was told:

> While this trial will concern numerous dates and events and persons, it is possible to roughly divide the thrust of the criminal attempts to obstruct the Grand Jury in four areas. These are number one, trying to influence the testimony of Kathy Michelis, number two, attempts to conceal records, number three, attempts to influence the testimony of Mike Dorn, Karen Bonanno and Ted Anderson, and four, influencing the testimony of Lou Peters. (RT: Vol. 14, p. 76, lines 1-8).

It is clear from the record that the defendants understood prior to trial, that the government had taped conversations between Peters and Bonanno beginning February 15, 1979 concerning the grand jury proceedings.

At the close of the government's case, Bonanno's counsel made a motion to strike Peter's testimony on

the ground that the government was aware that Bonanno was represented by counsel when the conversations occurred. In the course of argument Bonanno's counsel stated as follows:

> We, that is, court and counsel, certainly became aware during the pretrial hearings, at the very latest, that Mr. Peters had contacted Mr. Bonanno by telephone on or about February 15, 1979, and in the course of the recorded conversation that took place at that time, certain statements were made in the course of the conversation by Mr. Peters which the government has utilized as evidence in this case. (RT: Vol. 33, p. 1797, line 21 to page 1798, line 3).

The government made clear, however, in its reply to the defendant's motion of for entry of a judgment of acquittal, the significance it placed on the Peters transactions. In explaining the relationships of the evidence which had been presented, concerning discrete events, the government's attorney, Mr. Sterrett, told the court, in reference to the Peters transactions:

> It is, I would suggest to the court, a progression of proof, moving from ideas on paper to the words of the co-conspirators to the co-conspirators working with the object [Peters] of their criminal act. (RT: Vol. 35, p. 2025, lines 15-18).

At a later point in these remarks, Mr. Sterrett characterized the significance of the Peters transactions in these words: "I would suggest to the court that this

sequence involving Lou Peters is itself a completed set of circumstances which match the elements of a conspiracy to obstruct justice." (RT: Vol. 36, p. 2149, lines 10-12).

In closing argument, the government made clear that it was not asking the trial court to find the defendants guilty based on the evidence seized from Bonanno's trash cans. Mr. Sterrett argued as follows:

> I say to your honor that those notes have a limited purpose, because we would not begin to suggest to the court that based solely upon those notes that a conviction should be asked for. But they are important in terms of setting the stage for what was going on just prior to the time that we began to get the recorded conversations. And that's the main purpose of them. (RT: Vol. 43, p. 3042, lines 14-20).

At a later point in the opening argument the government referred to the Mike Dorn conversations, the Ted Anderson conversations, and various Peters conversations as "self contained" evidence each of which constituted "a violation of the indictment charged." (RT: Vol. 43, p. 3053, line 12 to p. 3054, line 15).

Mr. Krieger, counsel for Bonanno, commented in concluding his comments on the testimony of Peters as follows: "And the government has sought to prove its charged criminal activity by resort to uncharged criminal activity . . . ." (RT: Vol. 43 p. 3120, lines 9-10).

After the completion of argument on the guilt phase of the trial, the district court took this matter under submission.

C. The District Court Judgment

On August 12, 1980, the district court issued its Memorandum of Decision, finding each defendant guilty of "the offense charged in Count 1, and DiFilippi guilty of perjury as charged in Courts 2, 4, and 5.

In reviewing the evidence concerning Bonanno's and DiFilippi's conduct with respect to Peters, the district court stated: "In sum, the Peters episode leaves no room for reasonable doubt as to the intent of both defendants or *as to conspiratorial activity.*" (Emphasis in original).

Later in his written comments the district court judge stated: "Because of the means of memorialization the Peters incident speaks clearly for itself, as far as the issues in this case are concerned." Based solely on the above quoted statements it would appear that the trial judge had concluded that the Peters transactions, standing alone, had convinced him beyond a reasonable doubt that the defendants were guilty of conspiracy as charged in Count 1.

Later in the Memorandum of Decision, however, the trial judge made other statements that raised questions in this court's mind as to the precise evidentiary basis for the court's finding on the conspiracy charge. The troublesome language consisted of the following words: "On the basis of *all* the evidence in this case, including those *several items hereinabove referred to* I find that, beyond a reasonable doubt defendants BONANNO and DIFILIPPI are GUILTY of the offense charged in Count 1 . . ." (emphasis added).

Since the trial judge had earlier referred to transactions which occurred prior to February 15, 1979 involving Karen Bonanno and Ted Anderson, it was not clear what part these separate transactions played in the district court's determination that the defendants were guilty of conspiracy.

In order to eliminate all doubt as to the basis for the district court's finding that the defendant's were guilty of conspiracy we remanded this matter to the district court for the limited purpose of making specific findings as to the basis of the court's judgment.[9]

On January 11, 1982, the district court filed its decision in response to the limited remand ordered by this court. The district court set forth portions of the evidence concerning the Peters transactions and advised this court as follows: "I conclude on the basis of the above that there is sufficient evidence beyond reasonable doubt of the guilt of defendants and each of them apart from evidence seized as a result of the search of the defendant Bonanno's trash."

We are now convinced that the district court concluded that the defendants were beyond a reasonable doubt guilty of conspiracy to obstruct justice based on the evidence concerning the defendants' activities with Peters. Accordingly, we need not consider any issue concerning the admissibility of evidence seized from Mr. Bonanno's trash can unless there is proof that the Peters transaction was a fruit of that search.

DISCUSSION

A. Variance

The indictment contains no reference to any conversations with Peters or any acts intended to induce him to withhold evidence or give false testimony. The district court found the defendants guilty, however, based on the Peters transactions. We are told that this variance renders the judgment "fatally infirm."

The law of this circuit with respect to the question of whether a conspiracy conviction may rest upon the proof of an overt act that was not specifically charged in the indictment is set forth in *Brulay v. United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967). In *Brulay*, this court held that where such error occurs an appellate court must inquire as to whether any substantial right of the defendant was affected. *Id.* at 351.

Appellants have not indicated in what manner their substantial rights were affected by the variance in this case. As outlined above, the record establishes that defendants were aware before trial of the existence of the taped Peters conversations. The government repeatedly advised the trial court, beginning with the opening statement, that it was the theory of the prosecution that a conspiracy to obstruct justice could be sustained based solely on the instructions given by Bonanno and DiFilippi to Peters. Defense counsel did not object to the introduction of the Peters evidence on variance grounds, or seek a bill of particulars or claim surprise. The Peters testimony and taped conversations concerning Bill Bonanno's assets and income were related

to the type of conduct set forth in the indictment, *i.e.*, attempts to influence witnesses to lie and to withhold evidence from the grand jury. No motion was made to limit the admission of the Peters evidence to proof of intent or for any other purpose. Peters was presented as a witness at trial and thoroughly cross-examined.

Bonanno suggests that a trial by jury would not have been waived if he had been faced with a trial restricted to evidence of the Peters transactions. Specifically he argues: "Because of the nature and bulk of the evidence that was to be introduced, in the way of notes and taped telephone conversations, Mr. Bonanno, through counsel, made the decision to waive his right to a jury trial." Supplemental Brief of Appellant Joseph C. Bonanno, Sr., at 12. This argument is unpersuasive. First, it refers to matters outside the record that are properly before this court, *i.e.*, the reasons which motivated the defendants to waive jury. Second, we are not told in what manner a trial by a judge, standing alone, impairs a defendant's substantial rights. We find no reversible error based on the variance between the overt acts pleaded and those relied upon by the trier of fact in finding the defendants guilty of conspiracy.

B. Sufficiency of the Evidence

Appellants claim that the evidence upon which the trial judge found them guilty of conspiracy to obstruct justice was not sufficient to support such a finding. They also argue that their taped conversations were inadmissible hearsay. We disagree.

A conspiracy is established when there is an agreement to accomplish an illegal objective, an overt

act in furtherance of the illegal objective, and the intent necessary to commit the underlying offense. *United States v. Diggs*, 649 F.2d 731, 736 (9th Cir.), *cert. denied*, 102 S.Ct. 516 (1981); *United States v. Oropeza*, 564 F.2d 316, 321 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). The existence of a conspiracy may be established by circumstantial evidence from which a common scheme or plan may be inferred. *Diggs*, 649 F.2d at 736. We must affirm the judgment of the district court on the conspiracy charge if, viewing the evidence in the light most favorable to the government, there is relevant evidence from which any rational trier of fact could find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Wilson*, 666 F.2d 1241, 1249 (9th Cir. 1982).

Applying these principles to the matter sub judice, the following evidence established the existence of a conspiracy:

1. Peters testified that Bonanno and DiFilippi had involved themselves in Bill Bonanno's dealings with Peters concerning purchase of his car agency. During the course of Peters' relationship with Bill Bonanno, Peters sold a Cadillac for him.

2. Peters was subpoenaed to appear in front of a grand jury that was investigating Bill Bonanno's business affairs.

3. Peters testified that he told defendant Bonanno he had received the subpoena.

4. The taped conversations between defendant Bonanno and Peters on February 15, 1979 reveal that

defendant Bonanno directed Peters to remove documents relating to the sale of Bill Bonanno's Cadillac and to be prepared to destroy them.

5. The taped conversation between DiFilippi and Peters on February 27, 1979, indicates that DiFilippi directed Peters to put documents relating to the sale of Bill Bonanno's Cadillac in a "place where nobody thinks that it would be." Ex. 112-1 at 23.

6. Peters testified that on February 27, 1979, DiFilippi helped him hide documents related to the sale of Bill Bonanno's Cadillac in Peters' closet.

7. The taped conversation between DiFilippi and Peters on March 21, 1979 shows that DiFilippi suggested Peters give inaccurate responses to the grand jury if questioned about any conversation Peters had with Bonanno.

This evidence and the reasonable inferences that can be drawn therefrom established that defendant Bonanno and DiFilippi agreed to induce Peters to obstruct justice in violation of 18 U.S.C. §1503.

We find without merit Appellants' contentions that the taped conversations were inadmissible in proving the conspiracy charges. First, each defendant's own recorded statements are admissible against that defendant as a party admission. Fed.R.Evid. 801(d)(2)(A). Second, each defendant's statements are admissible against the other defendant as statements by a coconspirator of a party during the course and in furtherance of the conspiracy. Fed.R.Evid. 801(d)(2)(E). Appellants properly point out that independent evidence of a conspiracy is

a prerequisite to the admissibility of a coconspirator's statement under 801(d)(2)(E). Each defendant's own recorded statements, however, provide substantial independent evidence to establish the existence of the conspiracy so as to permit the introduction of the other defendant's statements. *See United States v. Perez*, 658 F.2d 654, 659 (9th Cir. 1981); *United States v. Weiner*, 578 F.2d 757, 770 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978). Both sets of taped conversations were therefore admissible against each coconspirator.

The evidence viewed in the light most favorable to the government, is such that any rational trier of fact could find guilt beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19; *Wilson*, 666 F.2d at 1249.

C. Taint

We have searched the record with special care to determine if the evidence concerning the Peters conversations was the result of the exploitation of information obtained from the trash search.

There is no evidence showing a factual nexus between the trash search and the conversations which began on February 15, 1979. The relationship between Peters and the defendant arose out of an offer by Bill Bonanno to buy Peters' Cadillac agency. Peters was asked by the FBI to go along with the proposed deal. After almost two years, the FBI determined that Peters should cease all contacts with the Bonanno family. Thus, the February 15, 1979 telephone conversation was made, not to gather evidence but to end Peters' investigative efforts. The Peters transactions were therefore untainted

and independent of any connection with the trash can search.

Because the district court did not rely on any evidence obtained as a result of the trash can search in determining the guilt of the defendants we need not decide whether the conduct of any of the officers was violative of the fourth amendment.

The judgment of the district court is AFFIRMED.

FOOTNOTES

[1]The basis of the finding of guilt by the district court is discussed *infra*.

[2]In discussing what Peters should do with any documents relating to the sale, Bonanno made the following statements which were taped:

> BONANNO: So, at this moment, on this moment, we'll do this. At this moment, that, ah, you pull that thing out there completely, huh?
>
> PETERS: I'll pull it out like you want me to. Yes, sir.
>
> BONANNO: Yes. And then save it in someplace very good, you know?
>
> PETERS: Sir?
>
> BONANNO: You save it in a place, in a good spot, you know?
>
> PETERS: Thank you, sir.
>
> BONANNO: This is temporary, you know?
>
> PETERS: Yes, sir.
>
> BONANNO: And then if a, if in case we want to destroy, you destroy after. Huh?
>
> PETERS: Huh, uh, I can't hear you, sir.
>
> BONANNO: If it's got to be destroyed, burn after, you do after.
>
> PETERS: Yes, sir.

Ex. 105-2 at 21-22.

[3] BONANNO: Alright. So about this visit, don't talk with anybody, please.

PETERS: No, no, sir.

BONANNO: If they say, do you talk to witness, I mean, I let's not repeat [inaudible] okey?

PETERS: Yeah, yes, sir.

Id. at 26.

[4] DI FILIPPI: And uh he [Bonanno] told me that you were concerned with this, uh, with the Cadillac, and the papers and something else in regards to Bill.

PETERS: Um hum.

* * *

DI FILIPPI: And, uh, he says to you, if that's what you think will hurt him then take everything out of there if you can.

Id. at 109.

[5] DI FILIPPI: Uh, well, this is you talking. Now . . . [the grand jury] is going to ask you if you informed me or told me.

PETERS: All right. What, what is the best way for me to say?

* * *

PETERS: All right. Then, then supposing . . . [the grand jury] says all right, now, fine, uh, in the time that, uh, you and Jack were together afterwards.

DI FILIPPI: Um hum.

PETERS: Did you discuss the subpoena, or was, uh Mr. Bonanno's name brought up?

DI FILIPPI: No.

* * *

DI FILIPPI: You called him [Bonanno] on the phone. You told him on the phone it's important that I talk to you.

PETERS: Yeah.

DI FILIPPI: Okay, now suppose it is bugged.

PETERS: Yeah.

DI FILIPPI: They [the grand jury] will pick it up. They will say to you, he will say to you, well what is so important that you want to talk to Mr. Bonanno about? What are you going to say? Huh? Don't you see that, what, well, that's the credibility what he's trying to do. To shake.

PETERS: Who?

DI FILIPPI: Your credibility starts to shake then. With him. Because if you. Because they already know what you told, told, called him and he said he wanted to talk to you.

PETERS: Uh, okay.

DI FILIPPI: Now let us see.

PETERS: How, how would this sound?

DI FILIPPI: Let us see if you, you sharp.

PETERS: All right. How would this sound? My mother's lost the sight of one eye.

* * *

PETERS: My understanding is that Mr. B is from, uh, the New York area. I thought, my mother's from, lives in Binghamtom, New York.

DI FILIPPI: Hm hm, hm hm.

PETERS: I thought maybe he might know of some expert, surgeon, that I could have flown in to Binghamton to take, cause my mom only has one eye left.

DI FILIPPI: Hm hm.

PETERS: No?

DI FILIPPI: Well, well.

* * *

DI FILIPPI: Ya, ya, you can say for instance that Uh, due, due to that, uh, necessity of your mom for the operation, I want you to know. You want to know from him if he knew back East because that's where he's coming from, any good, good surgeon, eye surgeon.

PETERS: Yeah.

DI FILIPPI: And this is why, this is why, I, I called him. In the meantime, you know, I took the, the chance, the occasion to wish him and also his wife [Happy Valentine's Day].

Ex. 112-1 at 27-30.

DI FILIPPI: Okay. And, ah, suppose they would ask you the question if, uh, if uh, you got, you got paid in cash or check. You don't recall that. How you got paid.

PETERS: Alright, you want me to say that if, they ask me . . .

DI FILIPPI: Uh huh.

Ex. 113-1 at 10.

[7] DI FILIPPI: So they would ask you, for instance, about, uh, Mr. DiFilippi's, did you talk to Mr. DiFilippi? Did you go and talk to Mr. DiFilippi? Did he give you any suggestions, or whatever? I don't think that, uh, Mr. DiFilippi ever gave me any suggestion. I don't think that I go and talk to Mr. DiFilippi. Ah, but the truth of the matter is that when I was talking to Mr. DiFilippi which has been a year before, he told me a year before. I told him. You asked me if I was in debt before and I said yes I was.

PETERS: Uh huh.

DI FILIPPI: And that is the truth. I told you that, uh, hiding information of any kind in a grand jurys, you know I mean, mean, is punishable by law. That means obstruction of justice.

Id. at 60.

[8] A. On September 4, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, a witness before the grand jury, in Los Gatos, California;

B. On September 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

C. On September 13, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

D. On September 17, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

E. On September 26, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Safford, Arizona to Karen Bonanno, in Los Gatos, California;

F. On October 8, 1978, defendant JACK DI FILIPPI placed a telephone call from a telephone in the city of San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

G. On October 8, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

H. On October 9, 1978, the defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

I. On October 10, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

J. On October 10, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

K. On October 11, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

L. On October 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in San Francisco, California;

M. On October 12, 1978, defendant JACK DIFILIPPI placed a telephone call from Burlingame, California, to the defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

N. On October 12, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the federal grand jury in San Francisco, California, as charged

in Counts Two and Seven of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

O. On October 13, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

P. On October 14, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

Q. On October 16, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

R. On October 18, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

S. On October 24, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

T. On october 25, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

U. On October 26, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the grand jury in San Francisco, as charged in Counts Three, Four, Five and Six of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

V. On or about October 28, 1978, defendant JACK DIFILIPPI travelled from his home in San Jose, California, to the Federal Prison Camp at McNeil Island, State of Washington, to speak to Salvatore "Bill" Bonanno, son of defendant JOSEPH C. BONANNO, SR. and a principal in the businesses named in paragraph 1 of this Count.

W. On October 29, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona.

X. On March 1, 1978, defendant JOSEPH C. BONANNO, SR. willfully withheld from the federal grand jury in Tucson, Arizona subpoenaed records and documents of and pertaining to the businesses named in Paragraph 1 of this Count.

Y. On or about March 16, 1979, defendant JOSEPH C. BONANNO, SR. destroyed subpoenaed records and documents of Kachina Fashions, Inc.

*The order stated:

Upon its own motion, the court remands this matter for 21 days to the district court for the limited purpose of making specific findings as to the basis for the court's judgment that defendants DiFilippi and Bonanno were guilty of conspiracy to obstruct justice. In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court shall conduct a hearing to consider additional argument on this limited issue.

The parties may file supplemental briefs addressing this issue within 14 days of any finding made by the district court pursuant to this order of limited remand.

Upon receipt of the court's findings and any supplemental briefs submitted by the parties, this matter will be resubmitted to this panel for decision.

APPENDIX E

[FILED OCT 15 1982]

[RECEIVED OCT 18 1982]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 81-1020 and
81-1021

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH C. BONANNO, SR.
and JACK DIFILIPPI,
Defendants-Appellants.

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

ORDER

Appellant Difilippi's motion to join in appellant Bonanno's petition for rehearing and suggestion for rehearing en banc is granted.

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*Honorable Richard B. Kellam, Senior United States District Judge for the eastern District of Virginia, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

First Amendment:

> Congress shall make no law . . . abridging the freedom of speech . . .

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor be deprived of life, liberty, or property, without due process of law . . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C.

Section 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1503:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having

been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be fined no more than $5,000 or imprisoned not more than five years, or both.

Rule 801(d)(2)(e), Federal Rules of Evidence:

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay.*

A statement is not hearsay if—

* * *

(2) *Admission by party-opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

APPENDIX G

[FILED APR 26, 1979]

[RECEIVED APR 30 1979]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CR. NO. 79-701-WAI-SJ

VIOLATIONS: 18 U.S.C. §371
(Conspiracy)
18 U.S.C. §1623
(Perjury)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH C. BONANNO, SR.
and JACK DIFILIPPI,
Defendants.

INDICTMENT

COUNT ONE: (18 U.S.C. §371)

The Grand Jury Charges: THAT

1. At all times pertinent to this Indictment:

a) The sons of defendant JOSEPH C. BONANNO, SR. and their families and associates owned and operated certain businesses in the Northern California area, specifically, U.S. Mattress and Furniture Co.; Kachina Enterprises, Inc.; Kachina Fashions, Inc.; and Los Gatos Construction Co.; and defendant JOSEPH C. BONANNO, SR., from time to time gave money to the foregoing businesses and to his sons;

b) The Federal Grand Jury in the Northern District of California and the Federal Grand Jury in the District of Arizona were investigating alleged violations of federal criminal statutes by persons associated with the foregoing businesses, including, among others, violations which involved:

(i) the use of the foregoing businesses in schemes to defraud;

(ii) the use of the foregoing business to receive and conceal money obtained by fraud;

(iii) the receipt and use of assets, capital, and income of the foregoing businesses by and for the personal benefit of persons associated with the foregoing businesses;

(iv) the use of the foregoing businesses to conceal personal income and assets of persons associated with the foregoing businesses;

c) It was material and relevant to this investigation that the grand jury obtain and examine books and records of and pertaining to the foregoing businesses;

d) It was material and relevant to this investigation that the grand jury know the nature and source of capital, assets, and income of the foregoing businesses, and that the grand jury determine the cash flow of the foregoing businesses;

e) It was material and relevant to this investigation that the grand jury determine how the capital, assets, income and cash flow of the foregoing businesses were used;

f) It was material and relevant to this investigation that the grand jury determine the extent to which individuals associated with the foregoing businesses received and used assets, capital, and income of the foregoing businesses for their personal use and benefit;

g) It was material and relevant to this investigation that the grand jury learn of any improper endeavors to influence its witnesses to withhold evidence or to give false testimony concerning the foregoing areas of inquiry;

2. From in or about September 1978, to and including the return date of this indictment, in the

County of Santa Clara in the Northern District of California, and elsewhere, the defendants JOSEPH C. BONANNO, SR. and JACK DIFILIPPI knowingly, willfully, and unlawfully combined, conspired, confederated, and agreed together and with others known and unknown to the grand jury to corruptly obstruct justice, in violation of Title 18, United States Code, Section 1503;

3. It was a part of the conspiracy to prevent the grand jury from learning all the material facts concerning the nature and source of capital, assets and income of the businesses named in Paragraph 1 of this Count, including facts concerning contributions by the defendant JOSEPH C. BONANNO, SR. to those businesses;

4. It was further a part of the conspiracy to prevent the grand jury from learning the extent to which individuals associated with the businesses named in Paragraph 1 of this Count received and used assets, capital, and income of those businesses for their personal use and benefit, including money contributed to those businesses by the defendant JOSEPH C. BONANNO, SR.;

5. It was further a part of the conspiracy to prevent the grand jury from learning the extent to which the businesses named in Paragraph 1 of this Count were used to conceal personal income and assets of individuals associated with those businesses;

6. It was further a part of the conspiracy to prevent the grand jury from learning of the defendants' illegal agreement to obstruct justice and of their corrupt

endeavors to keep material facts from the grand jury, as described herein;

7. To effect the foregoing objects of this conspiracy the defendants herein agreed to and did:

(a) hide, conceal and destroy books and records of and pertaining to the businesses named in Paragraph 1 of this Count;

(b) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the nature and source of assets, capital, and income to the foregoing businesses;

(c) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the receipt and use of assets and income of the foregoing businesses by and for the personal benefit of individuals associated with those businesses;

(d) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the use of the foregoing businesses to conceal personal assets and income of individuals associated with those businesses;

(e) falsely deny to the grand jury any communications between the defendants concerning this grand jury investigation or concerning other witnesses before the grand jury;

(f) endeavor to influence witnesses before the grand jury to falsely deny the defendants' corrupt

efforts to influence them in the course of this investigation, and to destroy evidence of such efforts.

OVERT ACTS

In furtherance of the foregoing criminal conspiracy, the defendants committed the following overt acts among others:

A. On September 4, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, a witness before the grand jury, in Los Gatos, California;

B. On September 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

C. On September 13, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

D. On September 17, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

E. On September 26, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Safford, Arizona to Karen Bonanno, in Los Gatos, California;

F. On October 8, 1978, defendant JACK DIFILIPPI placed a telephone call from a telephone in the city of San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

G. On October 8, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

H. On October 9, 1978, the defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

I. On October 10, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

J. On October 10, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

K. On October 11, 1978 defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

L. On October 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in San Francisco, California;

M. On October 12, 1978, defendant JACK DIFILIPPI placed a telephone call from Burlingame, California, to the defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

N. On October 12, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the federal grand jury in San Francisco, California, as charged in Counts Two and Seven of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

O. On October 13, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

P. On October 14, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

Q. On October 16, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

R. On October 18, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

S. On October 24, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

T. On October 25, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

U. On October 26, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the grand jury in San Francisco, as charged in Counts Three, Four, Five and Six of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

V. On or about October 28, 1978, defendant JACK DIFILIPPI travelled from his home in San Jose, California, to the Federal Prison Camp at McNeil Island, State of Washington, to speak to Salvatore "Bill" Bonanno, son of defendant JOSEPH C. BONANNO, SR. and a principal in the businesses named in paragraph 1 of this count.

W. On October 29, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona.

X. On March 1, 1978, defendant JOSEPH C. BONANNO, SR. willfully withheld from the federal grand jury in Tucson, Arizona subpoenaed records and documents of and pertaining to the businesses named in Paragraph 1 of this Count.

Y. On or about March 16, 1979, defendant JOSEPH C. BONANNO, SR. destroyed subpoenaed records and documents of Kachina Fashions, Inc.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 12, 1978, in the Northern District of California, the defendant JACK DIFILIPPI, while under oath as a witness before the special federal

grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath, the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Did you discuss with Joe, Sr. the fact that Michael Dorn had visited Tucson:

A. And visited Tucson.

Q. Michael Dorn, the follow you had breakfast with yesterday, did you discuss with Joe Bonanno, Sr.?

A. Michael Dorn went to Tucson?

Q. Yes.

A. Come on now, he couldn't even walk. The guy is in bad shape, and you say that he went to Tucson?

Q. Did you discuss the fact—

A. No, I did not discuss—

* * *

Q. You did not discuss with Joe Bonanno, Sr. the fact that Michael Dorn was in Tucson over the weekend?

A. No, I did not, because I didn't know.

which answers were false, as the defendant then and there well knew, in that, on or about October 8, 1978, defendant JACK DIFILIPPI did discuss with defendant

JOSEPH C. BONANNO, SR. the fact that Michael Dorn recently had come to Tucson, Arizona and had seen defendant JOSEPH C. BONANNO, SR., at that time,

All in violation of Title 18, United States Code, Section 1623.

COUNT THREE: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI, while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Did anybody make a phone call during the time that you were all together at dinner at the Velvet Turtle?

A. I got up to make a phone call.

Q. You did?

A. Yes.

Q. Who did you call?

A. You want to know? It is important to you?

Q. Yes.

A. I called my Uncle Joe, Joe Bonanno, Sr.

Q. What did you discuss with him?

A. I didn't discuss the Grand Jury.

Q. Did you tell him what you testified to in the Grand Jury?

A. I don't think I talked to him about those things at all, not because I couldn't tell him; it is not the issue. Right now I do believe that he is under doctor's care and I don't want to upset anybody.

Q. Did you tell him what Mike Dorn testified to in the Grand Jury?

A. No.

Q. Did you tell him what Karen Bonanno testified to in the Grand Jury?

A. No.

which answers were false, as the defendant then and there well knew, in that during the phone conversation from the Velvet Turtle Restaurant to the defendant JOSEPH C. BONANNO, SR., about which the defendant JACK DIFILIPPI testified, he told the defendant JOSEPH C. BONANNO, SR. what he had been asked

and what he had said in the grand jury on October 12, 1978, what Michael Dorn had been asked and what he believed Michael Dorn had said in the grand jury on October 12, 1978, and what Karen Bonanno had said and done in the grand jury on October 12, 1978,

All in violation of Title 18, United States Code, Section 1623.

COUNT FOUR: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Well, have you talked to Joe Bonanno, Sr. at all since your last appearance before the Grand Jury; have you discussed with him the subject of this Grand Jury investigation at all?

A. No . . .

* * *

Q. You say you have not discussed the Grand Jury testimony with him at all?

A. Ever.

Q. Never discussed it?

A. Never.

which answers were false, as the defendant then and there well knew, in that, on or about October 13, 1978, defendant JACK DIFILIPPI again did discuss with defendant JOSEPH C. BONANNO, SR. the proceedings before the grand jury on October 12, 1978,

All in violation of Title 18, United States Code, Section 1623.

COUNT FIVE: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following question and made the following answer:

Q. You have never discussed with him [Joseph C. Bonanno, Sr.] the subject of what Michael [Dorn] could or should say or would say to this Grand Jury?

A. No.

which answer was false, as the defendant then and there well knew, in that, on October 12, 1978, and again on October 13, 1978, defendant JACK DIFILIPPI did discuss with defendant JOSEPH C. BONANNO, SR. what testimony they wanted Michael Dorn to give to the grand jury concerning his visit to Tucson and concerning loans he made to Kachina Fashions, Inc.,

All in violation of Title 18, United States Code, Section 1623.

COUNT SIX: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following question and made the following answer:

Q. Has he [Joseph C. Bonanno, Sr.] ever asked you to talk to Michael Dorn about his testimony?

A. No.

which answer was false, as the defendant then and there well knew, in that in a conversation on October 12, 1978, JOSEPH C. BONANNO, SR. did ask the defendant JACK DIFILIPPI to tell Michael Dorn how he should testify about his trip to Tucson and about his loans to Kachina Fashions, Inc.,

All in violation of Title 18, United States Code, Section 1623.

COUNT SEVEN: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 12, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Have you ever participated with Mr. Bonanno, Sr., now, in any of his financial dealings?

A. No.

Q. Either have you lended him any assistance in—

A. No.

Q. —scouting out a deal or helped raise money for him?

A. No.

Q. You never had any dealings with him at all?

A. No, I never did, I can do myself.

Q. How about with Bill or Joe?

A. No, I never have had.

Q. Your testimony is you have never engaged in any business transactions with any of them?

A. Never.

which answers were false, as the defendant then and there well knew, in that, for the past several years, defendant JACK DIFILIPPI has represented the defendant JOSEPH C. BONANNO, SR., Salvatore "Bill" Bonanno, and Joseph C. Bonanno, Jr. in various business dealings,

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL.

FOREMAN

/s/ G. William Hunter
G. WILLIAM HUNTER
United States Attorney

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-877

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR T HE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted of conspiracy when the overt acts proved at trial were not enumerated in the indictment.

2. Whether out-of-court utterances made by petitioner's co-conspirator were improperly introduced against petitioner.

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JOSEPH C. BONANNO, SR., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR T HE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D24) is reported at 685 F.2d 447 (table). The decision of the district court (Pet. App. C1-C25) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D16) was entered on July 30, 1982. A petition for rehearing (Pet. App. E1-E2) was denied on October 15, 1982. The petition for a writ of certiorari was filed on November 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiring to obstruct justice, in violation

of 18 U.S.C. 371 (Count 1).[1] The court sentenced him to a term of five years' imprisonment and a $10,000 fine (C.R. 501).[2]

The evidence at trial established that petitioner conspired to influence witnesses to withhold evidence and give false testimony before a federal grand jury in San Francisco that was investigating his sons, Salvatore Bonanno and Joseph Bonanno, Jr. The investigation was begun in late June 1978 after the grand jury received information indicating that the Bonanno brothers were using their businesses to "launder" money and commit fraud (R.T. 12-13).[3]

In September 1978, the FBI recovered certain handwritten notes from petitioner's trash. Those notes, which were written by petitioner, contained references to the grand jury investigation, grand jury witnesses and potential witnesses, the records of some of the companies under investigation, and answers that certain grand jury witnesses could or

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[1]Petitioner was tried with Jack DiFilippi, who was convicted of the conspiracy and three counts of making false statements before a grand jury, in violation of 18 U.S.C. 1623 (Counts 2, 4, 5) (Pet. App. A1-A2). The court acquitted DiFilippi of two counts (Counts 3, 7) charging violations of 18 U.S.C. 1623 and dismissed another (Count 6) as duplicative of Count 5 (C.R. 132, 1-2, 9-10; Pet. App. A1-A2).

[2]"C.R." refers to the excerpt of record filed in the court of appeals. "R.T." refers to the trial transcript.

[3]Anthony Insanas testified that he was in partnership with Salvatore Bonanno in Los Gatos Construction Company and that, with the knowledge and blessing of Salvatore Bonanno, he defrauded elderly homeowners on home remodeling and repair contracts and split the fraudulently obtained money with Salvatore Bonanno (17 R.T. 279-303; 20 R.T. 35o-395; 21 R.T. 398-422; 22 R.T. 430-477).

should give before the grand jury.[4] In October, the government obtained a court order pursuant to 18 U.S.C. 2516 authorizing the interception of the conversations of petitioner and others over petitioner's home telephone. The government then intercepted several phone conversations between petitioner and co-defendant Jack DiFilippi and one conversation between petitioner and Salvatore Bonanno. These conversations were introduced at trial, together with petitioner's handwritten notes and consensually recorded conversations between petitioner and Louis Peters, a grand jury witness.

In June 1977, Peters told law enforcement officials that Salvatore Bonanno had offered to purchase his Cadillac dealership (29 R.T. 1323-1329). At the request of the FBI, Peters agreed to go along with the proposed deal and to cooperate with the FBI in its investigation of Salvatore Bonanno (29 R.T. 1329-1330). During the following months, Peters met DiFilippi, who said that he would be handling the arrangements to purchase Peters' business because Salvatore Bonanno was "tied up" (29 R.T. 1331-1334). Peters had many discussions with DiFilippi about the financing of that purchase and, later, about another business deal with Salvatore Bonanno (29 R.T. 1334-1392).

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[4]These were recovered during a "trash cover" surveillance of petitioner Bonanno in Tucson, Arizona, which agents of the Arizona Drug Control District had begun in December 1975. The agents collected petitioner's trash on mornings when it was regularly set out for collection by city sanitation workers (except on days when it was known that he was not in town) (1 R.T. 60). The trash was taken from cans that had been placed for collection approximately one foot from the curb on what petitioner stipulated was a public easement (1 R.T. 60; 2 R.T. 23-24; Pretrial Ex. No. I). The trash itself was usually in open grocery bags inside the cans, but on some occasions it was set beside the cans (2 R.T. 18-19, 47). After collecting the trash, the agents removed the notes or parts of notes from the rest of the trash; often the notes were torn, but sometimes they were not (2 R.T. 22-23).

By early February 1979, it had become apparent to Peters and the FBI that the business deals proposed by Salvatore Bonanno and DiFilippi were not nearing culmination. It was decided that Peters' part in the investigation should be ended in such a way as to avoid disclosure of his cooperation with the FBI. Accordingly, it was decided that Peters should testify before the grand jury, and on February 15, 1979, he was served with a grand jury subpoena (29 R.T. 1392-1393). Peters then telephoned petitioner and told him of the subpoena. He also informed petitioner that he had sold Salvatore Bonanno's Cadillac and had given him the proceeds in cash. Petitioner then told Peters not to reveal that sale to the grand jury and to hide any records of it (Ex. 105-2, at 2-3, 7-11, 21-26).[5] Petitioner also instructed Peters to deny that they had engaged in the conversation during which these matters were discussed (Ex. 105-2, at 17-19, 26).

2. On appeal, petitioner contended that the government had violated the First Amendment in searching and seizing the contents of his trash can. On its own motion, the court of appeals remanded the case to the district court to make "specific findings as to the basis for the court's judgment," and, in particular, "as to whether there was sufficient evidence, beyond a reasonable doubt," apart from the evidence taken from petitioner's trash can (Pet. App. B1-B2). On remand, the district court found that the remaining evidence was sufficient beyond a reasonable doubt and relied upon the evidence of petitioner's attempt to influence Peters

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[5] "Ex." refers to the government's exhibits at trial. It was apparent from the evidence at trial that petitioner Bonanno was concerned about what conclusions the grand jury would draw from certain of his son's financial dealings—particularly those involving cash. Bonanno was aware that his son's financial dealings were a major subject of inquiry during earlier proceedings in 1978 to revoke his son's probation (27 R.T. 1117-1120, 1122-1123). The Cadillac in this case was nominally owned by Salvatore Bonanno's business.

to testify falsely regarding the sale of Salvatore Bonanno's Cadillac (Pet. App. C1-C25). The court of appeals then affirmed petitioner's conviction without reaching the issue of the legality of the trash can searches (Pet. App. D1-D24).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 18-25) that his conspiracy conviction must be reversed because his attempt to influence Peters to testify falsely was not listed in the indictment as an overt act. This argument is invalid. It has long been established that a conspiracy conviction may rest upon proof of an overt act not charged in the indictment, unless the omission affects the defendant's substantial rights. See, e.g., *Brulay* v. *United States*, 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 986 (1967); *United States* v. *Armone*, 363 F.2d 385 (2d Cir. 1966); *Napolitano* v. *United States*, 340 F.2d 313 (1st Cir. 1965); *Culp* v. *United States*, 131 F.2d 93 (8th Cir. 1942); *Worthington* v. *United States*, 1 F.2d 154 (7th Cir.), cert. denied, 266 U.S. 626 (1924).

In the present case, petitioner does not point to any basis for concluding that he was prejudiced by the omission. On the contrary, it is clear that petitioner was not surprised at trial by the introduction of the evidence relating to his dealings with Peters. Not only did petitioner's efforts to influence Peters' testimony fall squarely within the allegation in the charging paragraph of the conspiracy count, which alleged that petitioner and DiFilippi conspired "to corruptly obstruct justice" (Pet. App. G4), but that conduct was clearly described in succeeding paragraphs alleging that the defendants had attempted to achieve the objectives of the conspiracy by endeavoring to influence grand jury witnesses to testify falsely and withhold evidence (Pet. App.

G5-G6). Moreover, the government provided petitioner with copies of the tapes and the transcript of the Peters conversations (1 R.T. 41, 144), and matters involving Peters were the subject of defendants' pretrial motions (C.R. 235, at 16; C.R. 101, at 12) and a pretrial hearing at which petitioner was present and testified (3 R.T. 271-277; 5 R.T. 107, 152-156). As the court of appeals stated, "the government repeatedly advised the trial court, beginning with the opening statement, that it was the theory of the prosecution that a conspiracy to obstruct justice could be sustained based solely on the instructions given by [petitioner and his codefendant] to Peters" regarding his grand jury testimony (Pet. App. D11; 14 R.T. 75-76, 83-86). No objection was made to the introduction of the Peters evidence on the grounds of variance. Nor did defense counsel seek a bill of particulars or claim surprise at trial (Pet. App. D11).

Petitioner's reliance upon this Court's decision in *Dunn* v. *United States*, 442 U.S. 100 (1979), is misplaced. In *Dunn*, the defendant was convicted of violating 18 U.S.C. 1623 by making two inconsistent declarations in proceedings "before or ancillary to [a] court or grand jury of the United States." The inconsistency between the two statements alleged in the indictment was the sole theory upon which the case was tried and submitted to the jury (see 442 U.S. at 106). The court of appeals affirmed, however, based upon the inconsistency between one of those statements and a third declaration. This Court reversed, holding (as the government conceded) that the defendant could not be convicted "on a charge that was neither alleged in [the] indictment nor presented to [the] jury at trial" (*ibid.*).

In the present case, petitioner's conviction was affirmed on the basis of the charge alleged in the indictment and proved at trial: conspiring with DiFilippi and others at a

particular place and time to obstruct justice.[6] The essence of a conspiracy is the illegal agreement (see *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)), not the overt acts committed in furtherance of it. An overt act need not be criminal and may in itself be entirely innocent. See, e.g., *United States* v. *Andreen*, 628 F.2d 1236, 1248 (9th Cir. 1980); *United States* v. *Donahue*, 539 F.2d 1131, 1136 (8th Cir. 1976). Nor need the government prove that each conspirator committed an overt act in order to convict; it must show only that one overt act was committed by one conspirator. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). A conspiracy indictment need not enumerate every overt act, and the government may prove overt acts not listed in the indictment. See, e.g., *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States* v. *Harris*, 542 F.2d 1283, 1300 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir.), cert. denied, 423 U.S. 926 (1975). *United States* v. *Quesada*, 512 F.2d 1043, 1046 (5th Cir.) cert. denied, 423 U.S. 946 (1975). Likewise, the government is not required to prove all overt acts listed in the indictment. See, e.g., *United States* v. *Parker*, 586 F.2d 1253, 1258 (8th Cir. 1978); *United States* v. *Adamo*, 534 F.2d 31, 38 (3d Cir.), cert. denied, 429 U.S. 841 (1976). And, as previously noted (see page 5, *supra*), the courts of appeals have consistently held that a conspiracy conviction may be based upon an overt act not enumerated in the indictment. Thus, affirming a conspiracy conviction on the basis of an overt act proven at trial but not alleged in the indictment is entirely different from "uphold[ing] a conviction on a

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[6]Certainly petitioner was not convicted on the basis of a charge not presented to the trier of fact, since the trial judge in this case explicitly stated he had found petitioner guilty of conspiracy to obstruct justice based on the Peters evidence (Pet. App. A7-A11; C1-C25).

charge that was neither alleged in [the] indictment nor presented to [the] jury at trial" (*Dunn* v. *United States*, *supra*, 442 U.S. at 106).[7]

2. Petitioner also asserts (Pet. 25-30) that DiFilippi's statements were improperly admitted against him as co-conspirator declarations (Fed. R. Evid. 801(d)(2)(E)) because the government failed to introduce sufficient independent evidence to prove the existence of the conspiracy. The court of appeals correctly concluded (Pet. App. D15), however, that petitioner's own statements during those conversations were admissible as admissions (Fed. R. Evid. 801(d)(2)) and provided sufficient independent evidence of the conspiracy. This factual conclusion was correct and in any event does not warrant further review by this Court.

In a conversation recorded on February 15, 1979, Peters informed petitioner that he had received a grand jury subpoena and that he was concerned about testifying regarding the cash sale of Salvatore Bonanno's Cadillac. Petitioner

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[7]Petitioner appears to advance several other claims related to his contention that his conviction could not properly be affirmed on the basis of an overt act not charged in the indictment, but those claims are clearly without merit. Petitioner states (Pet. 20) that "the Ninth Circuit remanded the case for what amounted to a new, summary trial upon an old record" and that at this "retrial" he was denied "the right to prepare his defense, confront the witnesses against him, and have his case tried before an impartial trier of facts" (Pet. 25). However, petitioner was afforded all those rights at trial and no new evidence was introduced on remand. The court of appeals merely remanded so that the district court could make specific findings as to the basis for the court's original judgment.

Petitioner also suggests (Pet. 20 & n. 19) that the court of appeals was required to decide whether the government violated his First Amendment rights by removing his torn-up handwritten notes from the trash and assembling them. However, resolution of that question was not necessary in order to decide petitioner's appeal.

instructed Peters not to give the grand jury the records concerning that sale and not to reveal their conversations to anyone (Pet. App. C2-C12). Petitioner asserts (Pet. 28) that the only legitimate inference that may be drawn from this evidence is that he acted alone in seeking to induce Peters to withhold evidence. However, the following additional evidence permitted the district court to infer that petitioner and DiFilippi were acting in concert: (1) a few days after Peters spoke with petitioner, DiFilippi also sought to have Peters withhold evidence regarding the cash sale of the car and assisted Peters in hiding the records of the sale (Pet. App. C12-C22);[8] (2) Peters had not told DiFilippi about his February 15 conversation with Bonanno (Ex. 108-111, 12-13; Pet. App. C12). It was therefore reasonable for the district court to infer, as it did (Pet. App. A8-A10, C21-C22), that petitioner and DiFilippi had conferred about the implications of Peters' subpoena and his potential grand jury testimony and had agreed that they should attempt to have Peters withhold information about the cash sale of petitioner's son's car.

Moreover, it is apparent that none of the utterances of DiFilippi upon which the court of appeals relied in sustaining petitioner's conviction was "offered in evidence to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) and thus none was hearsay. The court of appeals relied upon the following two statements made by DeFilippi (Pet. App. D14; emphasis added):

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[8]DiFilippi's instructions for Peters to withhold evidence (see Pet. App. D14) were introduced simply to prove that they were given and not "to prove the truth of [any] matter asserted" (Fed. Rev. Evid. 801(c)). Thus, they were not hearsay, as petitioner maintains (Pet. 29 & n.23), and could be used to establish the predicate for the admission of co-conspirator statements.

5. The taped conversation between DiFilippi and Peters on February 27, 1979, indicates that *DiFilippi directed Peters to put documents relating to the sale of Bill Bonanno's Cadillac in a "place where nobody thinks that it would be."* Ex. 112-1 at 23.

* * * * *

7. The taped conversation between DiFilippi and Peters on March 21, 1979 shows that *DiFilippi suggested Peters give inaccurate responses to the grand jury if questioned about any conversation Peters had with Bonanno.*

These commands were obviously introduced simply to show that they were made and not to prove the truth of any matter asserted. Indeed it is difficult to read them as asserting the truth of anything.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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